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Jurisdiction over Communication Torts: Can You be Pulled into Another Country's Court System for Making a Defamatory Statement over the Internet?--A Comparison of English and U.S. Law

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**Jurisdiction Over Communication Torts: Can You
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Comparison of English and U.S. Law**

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I. INTRODUCTION

Over the past few years, the number of persons communicating via the Internet,¹ sometimes referred to as cyberspace,² has soared.³ Along with the ease

1. See *infra* Part II (discussing the Internet).

2. This term was created by William Gibson in his novel "Neuromancer." EDWARD A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 1* (1994). The concept encompassed a link connecting the human brain to a computer in order to give one the illusion of physical presence in an information "matrix" from which one could gather information. *Id.* See Laurence A. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier* (visited Oct. 1995 and on file with *The Transnational Lawyer*) < <http://www.io.com/ss/Tribe.html> > (describing "cyberspace" as a

of communicating with people in various countries and continents comes the ability to cause serious damage to the reputation of the subject of the communication.⁴ Defamation⁵ on the Internet can occur through electronic mail messages, publication of a World Wide Web (WWW) page, or through communications in discussion groups.⁶ Due to a recent influx of law suits stemming from defamatory statements communicated via the Internet,⁷ many legal issues impacting the

place "where voice-mail and e-mail messages are stored and sent back and forth, and where computer-generated graphics are transmitted and transformed, all in the form of interactions, some real-time and some delayed, among countless users, and between users and the computer itself[.]"; HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING THE ELECTRONIC FRONTIER* 5 (1993) (explaining "cyberspace" as a world created by the "words, human relationships, data, wealth, and power . . . by people using [computer-mediated communications]."); see also *infra* notes 26-50 (providing the components of the Internet); *ACLU v. Reno*, 929 F.Supp. 824, 831 (E.D. Pa. 1996) (viewing cyberspace as a "decentralized, global medium of communications" linking people worldwide).

3. See CAVAZOS & MORIN, *supra* note 2, at 9-10 (explaining how the dimensions of the Internet expand daily as new systems go on-line and that although exact numbers are unknown, it is estimated that millions of people are interacting at a given time). As of the end of 1995, there were 55,000,000 users on the Internet, worldwide. *World Wide Web User Statistics* (visited Sept. 28, 1996 and on file at *The Transnational Lawyer*) <<http://www.why-not.com/company/stats.htm>>. This number doubles every nine months, with the expectation that 80% of the world population will be on-line by the year 2000. *Id.* But see *Internet Demographics* (visited Oct. 6, 1996 and on file with *The Transnational Lawyer*) <<http://www.blgt.com/demograf.html>> (providing that there is no way to measure the growth of the Internet). Since no single entity controls the Internet, exact statistics are unknown; thus surveys are used for estimations. *Id.* The number of host systems, i.e. computers directly connected to the Internet, was 9,500,000 as of January 1996. *Id.* As of July 1996, there were 3,054 Internet Service Providers worldwide. *Id.* See *Yahoo! Business and Economy: Companies: . . . Internet Access Providers* (visited Sept. 29, 1996 and on file with *The Transnational Lawyer*) <http://www.yahoo.com/Business_and_Economy...nternet_Access_Providers/National_U_S_/> (providing a list of U.S. service providers providing access to the Internet); *Yahoo! Regional: Countries: United Kingdom...Internet Access Providers* (visited Sept. 29, 1996 and on file with the *Transnational Lawyer*) <http://www.yahoo.com/Regional/Countries/U...ernet_Services/Internet_Access_Providers/> (listing U.K. service providers providing access to the Internet).

4. See CAVAZOS & MORIN *supra* note 2, at 78 (finding that due to the ease and speed with which one can spread a message across the world, there is great potential for damaging a person's reputation.) A single communication questioning someone's character could reach countless individuals and do irreparable harm to the subject's reputation. *Id.* See Nick Braithwaite, *The Internet and Bulletin Board Defamation*, 145 NEW L.J. 678, 1216 (1995) (commenting on the global nature of communications over the Internet and how defamation may occur in any country).

5. See *infra* Part III (defining defamation and providing the legal requirements for a cause of action in England and the United States).

6. See CAVAZOS & MORIN, *supra* note 2, at 78 (providing that defamation on the Internet can occur from various modes of communication on the Internet); *infra* notes 26-50 and accompanying text (addressing certain tools for communicating on the Internet); *infra* note 7 (discussing the various law suits stemming from defamatory Internet communication made on newsgroups and bulletin board systems).

7. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 138 (S.D.N.Y. 1991) (addressing the issue of whether an owner and operator of an electronic bulletin board should be liable for defamatory statements posted on their bulletin boards). The judge held that the on-line service was not liable for the statements posted since CompuServe neither wrote nor edited the statement. *Id.* at 140. CompuServe was compared to a book store which only distributes publications and thus has no duty to monitor the contents of the publications. *Id.* at 39-40. But see *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 94-31063, 1995 N.Y. Misc. LEXIS 229, at *10 (N.Y. Sup. May 24, 1995) (holding the on-line service provider liable since Prodigy prided itself on controlling bulletin board content and has an editorial staff that monitored transmissions). The judge agreed

Internet community, as well as the legal world, are surfacing. Crucial defamation issues include: defining who is subject to liability and which standards to apply;⁸

that bulletin boards should be viewed as bookstores and libraries. *Id.* Bookstores and libraries are only liable if they have a reason to know material is defamatory. Richard Raysman & Jeffrey D. Neuburger, *On-line Services—Could You Be Found Liable?*, INFO. WK., Sept. 25, 1995, at 140. Since Prodigy made a deliberate decision to gain the benefits of editorial control, it put itself in the position of determining what is proper for its members to post and read on the bulletin boards. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, at *10. Prodigy determined what was proper by using a program that prescreened messages for obscenities and used its staff to enforce guidelines. Raysman & Neuburger, *supra*, at 140. Although on appeal, the case was recently settled out of court. Elizabeth Corcoran, *\$200 Million Libel Suit Against Prodigy Dropped*, WASH. POST, Oct. 25, 1995, at F2. On October 24, 1995, the parties issued a joint press release during which Prodigy apologized for the damage to Stratton Oakmont's reputation, and Stratton Oakmont agreed not to oppose Prodigy's request to make a motion for summary judgement. *Id.* Prodigy filed a motion to reargue the case which was denied on December 11, 1995. MEDIA L.R. (BNA) No. 21, at 1126, 1127-28 (N.Y. Sup. Ct. Dec. 11, 1995). The trial court issued an order not to vacate its earlier decision holding on-line service providers liable when they exercise control over content. *Id.* See *Tamburo v. Calvin*, 1995 U.S. Dist. LEXIS 3399 (Mar. 15, 1995) at *5-6. Tamburo involved individuals from different states, where one made several defamatory statements about the other on a bulletin board available via Prodigy. *Id.* The judge held that the plaintiff stated a claim for defamation, however leave to amend the complaint was granted so that the plaintiff could establish actual damages over \$50,000 in order to comport with requirements for subject matter jurisdiction based on diversity. *Id.* at *41. See *Rindos v. Hardwick*, No. 940164 (W. Austl. Sup. Ct. Mar. 1994), (visited Oct. 23, 1995 and on file with *The Transnational Lawyer*) <<http://Mark.law.auckland.ac.nz/cases/Rindos.html>>. The case concerned libel statements published on the DIALx science anthropology computers bulletin board, an international computer news service used by universities world-wide; 23,000 people have access to the board. *Id.* The judge considered the statements distributed to "the World" to be defamatory and awarded the plaintiff \$40,000. *Id.* See *Proposed UK Libel Law Poses Threat to Internet Service Providers*, FIN.TECH. TELECOM MKTS, July 6, 1995, available in LEXIS, Cmpcom Library, Comm File (discussing the first electronic libel case in England, between London lecturers Laurence Godfrey and nuclear physicist Philip Hallan-Baker, regarding statements made on a conference server available to 16 million users). The suit was settled out of court. *Id.* The messages were posted from Usenet labs in Germany and Switzerland and the resulting suit was filed in England where libel laws are harsh. *Litigation Libel on the Net*, INFO. WK., Oct. 31, 1994, at 10, available in LEXIS, Cmpcom Library, Comm File. See Charles Wright & Lisa Mitchell, *Digital Defamation Risk in a Very Public Mail Service*, THE AGE (Melbourne), April 6, 1993 (discussing the American Medphone case, where Medphone sued Mr. DeNigris, a Prodigy user, for defamatory statements posted on a bulletin which allegedly caused Medphone's stock prices to drop drastically); see also Jamie Prime, *Shallow Pockets: Libel Suit Against an Internet User*, 82 THE QUILL, Oct. 1994, at 30, available in LEXIS News Library, AsapII File (discussing a suit between Suarez Corp. Industries Inc. and Brock Meeks, where the former sued the latter for calling the corporation a "cybersucker" over the Internet and for \$25,000 in legal bills that thwarted Meeks financial ability to continue the legal fight). See generally Mike Godwin, *What's Important About the Medphone Libel Case?*, (visited Oct. 1995 and available on file at The Transnational Lawyer) <<http://www.eff.org/pub/EFF/Newsletters/EFFector/effector5.05>> (discussing the Medphone case).

8. See *Internet Protection Proposed*, 15 COMM. DAILY 118, June 20, 1995, at 1, available in LEXIS Cmpcom Library, Comm File (discussing effects of *Stratton Oakmont v. Prodigy* case, and FCC proposals regarding liability of on-line service providers); see also *Tenth Anniversary: ISA Convention Proves Showcase for New Players*, 15 COMM. DAILY, July 14, 1995, at 6, available in LEXIS Cmpcom Library, Comm File (regarding suggestions by Prodigy's attorney that service providers exercise minimum control over content while using contracts to require users to assume more of the risk for the content of their communications.); *Advertising in Cyberspace*, 12 COMPUTER LAW., Sept. 1995, at 1 (questioning when an on-line service provider is liable); Rex S. Heinke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, 11 COMPUTER LAW., July 1994, at 1, available in LEXIS Cmpcom Library, Cpllawr File (discussing liability and analogizing to other media); *New Law to Protect Net Firms From Libel Action: Originators to be Responsible for Defamatory Material*, COMPUTER WKLY., June 8, 1995, at 6, available via LEXIS News

determining the place of publication;⁹ establishing what constitutes a publication;¹⁰ determining how to maintain a cause of action against an anonymous defamer;¹¹ ascertaining which country's law applies;¹² and deciding whether an individual can be subject to the jurisdiction of the court of another country based on a defamatory statement disseminated over the Internet.¹³

The jurisdictional problem of suing people for their activities over the Internet, a medium recognizing no geographic boundaries,¹⁴ is a growing concern in light of the increase in defamation suits stemming from Internet communications. If the person being sued cannot be brought under the jurisdiction of another country's court system, then that court will not be able to address the issues raised by defamatory publications over the Internet.¹⁵

The global nature of the Internet enables users to transmit communications worldwide. When these communications are defamatory the responsible party may be sued and held legally responsible.¹⁶ Plaintiffs will want to bring suit where the defamation laws are most favorable for them. England, a country with defamation laws favoring plaintiffs, will be an obvious choice.¹⁷ Unlike the United States, where the Constitution requires some degree of fault by the

Responsible for Defamatory Material, COMPUTER WKLY., June 8, 1995, at 6, available via LEXIS News Library, AsapII File (discussing the new British libel act known as "Defamation (Responsibility for Publication) Bill").

9. See *infra* Part III (discussing required elements for a defamation action).

10. See *infra* Part III (discussing required elements for a defamation action).

11. See Interview with Alexander Kaplinsky, Vice President of USWeb NetWORKERS Web Consulting, Inc. (Feb. 5, 1996) (explaining how individuals on the Internet can utilize anonymous remailers to ensure the anonymity of their communications). At the time of publication, Mr. Kaplinsky could be contacted via e-mail at alex@networkers.com or <http://www.networkers.com>.

12. See Charles Mann, *Regulating Cyberspace*, 268 SCIENCE, May 5, 1995, at 628, available in LEXIS News Library, AsapII File (discussing impossibility of obeying the laws of all countries in light of the interconnectedness of the Internet); see also Mitch Betts & Gary H. Anthes, *On-line Boundaries Unclear: Internet Tramples Legal Jurisdictions*, COMPUTER WORLD, June 5, 1995, at 1, available in LEXIS, News Library, Cmpwld File (describing how harm occurs where the message is read). Since the message can be read anywhere when communicating via the Internet, there is enormous potential for forum shopping. *Id.* See Jon Weiner, *Free Speech on the Internet*, 258 THE NATION 23, June 13, 1994, at 23 (noting that it is easier to win a libel suit in Australia than in the United States). See Braithwaite *supra* note 4, at 1216 (distinguishing U.S. libel law from that in England); *Litigation—Libel on the Net*, *supra* note 7, at 10 (relating the potential to sue in any country where the system has a user and addressing the existence of differences of libel law in various countries).

13. See CAVAZOS & MORIN *supra* note 2, at 78 (citing Loftus E. Becker, Jr, *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203 for the proposition that legal scholars have spent more time analyzing and discussing on-line libel than most other legal issues posed by Internet communications).

14. Unlike other forms of media, Internet speakers cannot limit the geographic scope of their communications. *ACLU v. Reno*, 929 F.Supp. 824, 877 (E.D. Pa. 1996).

15. See *infra* Part IV (providing that in both the United States and England, the courts must have jurisdiction over the parties in order to hear the suit); *supra* notes 8-13 and accompanying text (describing other legal issues involved with defamation on the Internet).

16. See *infra* Part IV (discussing liability for defamatory communications).

17. See *infra* notes 54-87 and accompanying text (discussing English libel law).

defendant, England does not require a plaintiff to prove fault to maintain a defamation cause action.¹⁸ This comment focuses on the libel aspect of defamation law¹⁹ in England and the United States as it affects private individuals on the Internet.²⁰ Part II provides a description of the Internet and the protocols by which one may communicate in that medium.²¹ Part III provides a brief description and comparison of current libel law²² in England and the United States.²³ With this framework in place, Part IV examines the requirements necessary to bring a foreign defendant into a U.S. court for a libel suit as well as the requirements for bringing a foreign defendant into an English court.²⁴ Part V concludes with a discussion of the problems inherent in applying traditional jurisdictional principles based on geographic boundaries to communications on the Internet where geographic location is irrelevant, and offers four proposals addressing these problems.²⁵

II. THE INTERNET

A. Defined

The Internet is a matrix of interconnected networks of computers.²⁶ A user's computer connects to other computers via analog or digital lines, including but not limited to, conventional phone lines.²⁷ Once this connection is complete, the

18. See *infra* notes 111-193 and accompanying text (comparing English and U.S. libel law).

19. See CAVAZOS & MORIN, *supra* note 2, at 78 (stating that defamation over the Internet is classified as libel).

20. See Kimberly Richards, Comment, *Defamation via Modern Communications: Can Countries Preserve Their Traditional Policies?*, 3 TRANSNAT'L LAW. 3 at 613 (1990), for a discussion on defamation law as it applies to public figures.

21. See *infra* Part II.

22. Slander refers to spoken messages while libel refers to those which are written. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §112, at 785 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Defamation will probably always be considered libel on the Internet. CAVAZOS & MORIN, *supra* note 2 at 78.

23. See *infra* Part III (examining defamation law in England and the United States).

24. See *infra* Part IV (discussing jurisdiction over foreign defendants).

25. See *infra* notes 264-69 and 320-64 and accompanying text (illustrating the difficulties of applying jurisdictional principles to the Internet). Normally with torts, the suit is filed where the tort occurred or the place of defendant's residence. Rosalind Resnick, *Cybertort: The New Era*, NAT. L.J., July 18, 1994, at A1. Attorneys recognize that the problem with the Internet is that there is no physical place. *Id.* A suit could be filed potentially anywhere the network touches. *Id.*

26. See ILC Glossary of Internet Terms, (visited Oct. 5, 1996 and on file with *The Transnational Lawyer*) <<http://www.matisse.net/files/glossary.html>> [hereinafter ILC Glossary] (defining the Internet as a collection of interconnected computer networks. Networks are a connection of two or more computers sharing resources. *Id.* As of July 1995, the Internet connected about 60,000 networks into a worldwide internet. *Id.* Internet, spelled with a lower case "i," refers to a connection of two or more networks. *Id.*

27. Interview with Alexander Kaplinsky, Vice President of USWeb NetWORKERS Web Consulting, Inc. (Mar. 1, 1996). At the time of publication, Mr. Kaplinsky could be contacted via e-mail at alex@networkers.com or <<http://www.networkers.com>>.

individual user's computer is linked to what is known as a "host system."²⁸ This host is, in turn, linked to multiple other hosts containing a vast array of different forms of information.²⁹

Though the Internet refers to many different networks and network protocols, for purposes of this comment, the World Wide Web (WWW), discussion groups, and electronic mail (e-mail) constitute the Internet.³⁰ Use of these protocols allow a moderately sophisticated user to disseminate written or graphic information to multiple users worldwide.³¹

B. Modes of Communication on the Internet

1. The World Wide Web (WWW or The Web)

The fastest growing region of the Internet is the WWW.³² Web browser software allows the user to access Internet sites which contain a vast array of information such as corporate reports, sport scores, individuals' private vacation pictures and newsletters about various topics.³³

28. CAVAZOS & MORIN, *supra* note 2, at 1-2. "Host" refers to any computer on a network that houses services for use by other computers on the network. *Id.* One host machine often provides several services like WWW and USENET. *Id.* See *infra* notes 32-37 and 42-50 and accompanying text (discussing the WWW and USENET).

29. Kaplinsky, *supra* note 27. Examples of information contained on hosts include: company information, advertisements, and databases. *Id.*

30. See *infra* notes 32-50 and accompanying text (discussing the World Wide Web, discussion groups and electronic mail).

31. Kaplinsky, *supra* note 27. Other protocols include gopher & ftp. *Id.* See *ILC Glossary*, *supra* note 26, for a definition of these protocols. Geographic separation is irrelevant to the speed with which information travels; a message takes only seconds to travel around the world. Kaplinsky, *supra* note 27. With the push of a button, electronic mail messages can be sent to millions of worldwide users simultaneously, thus providing people the power to become their own instant multinational publisher. *Id.*

32. Kaplinsky, *supra* note 27. See *Webcrawler: Special—Web Size* (visited Sept. 28, 1996 and on file with *The Transnational Lawyer*) <<http://webcrawler.com/WebCrawler/Facts/Size.html>> (providing that as of September 1996, the Web's size had increased six times over the past year, with most of the growth due to new Web servers); <www.hotwired.com/wired/4.02.features/jobs.html> (visited Sept. 29, 1996 and on file with *The Transnational Lawyer*) (commenting on the exponential growth of the WWW); *ACLU v. Reno*, 929 F.Supp. 824, 836 (E.D. Pa. 1996) (referring to the WWW as the most well-known method of communicating on the Internet). The WWW project, started by the European Laboratory for Particle Physics (CERN), strives to build a distributed hypermedia system. <<http://www.w3.org/pub/www/www/>> (visited on Sept. 29, 1996). The advantage of hypertext is that in a hypertext document, if a user wants more information about a particular topic mentioned, he or she can usually "just click on it" to obtain further detail. Kaplinsky, *supra* note 27. In fact, documents by different authors can be and often are linked together; this is similar to footnoting, but the document can be retrieved immediately. *Id.* See *ACLU v. Reno*, 929 F. Supp. at 835-36 (providing an in depth discussion of the technical nature of the WWW).

33. Kaplinsky, *supra* note 27. A browser is a software program used for looking at Internet resources. *ILC Glossary*, *supra* note 26. Examples of browsers include Netscape and Mosaic. *Id.* See *id.* (elaborating on Netscape and Mosaic).

It is becoming easier for people to publish their own Web sites.³⁴ Many on-line providers³⁵ allow subscribers to host personal Web pages.³⁶ The ease of setting up and the low cost of maintaining a Web page enables almost anyone to publish communications instantly accessible to millions of users throughout the world.³⁷

2. Electronic Mail (E-Mail)

Electronic mail enables individuals to send and receive electronic messages by way of a computer network.³⁸ This permits mass communication to a wide variety of users.³⁹ The ability to send a message to thousands of people with little effort opens up the user's potential risk of being legally responsible for spreading defamatory statements wherever they are published, which can be anywhere in the world.⁴⁰

3. Discussion Groups

A "message base" is a place where written communications can be posted⁴¹ for viewing by subscribers.⁴² With the help of networking, subscribers to one service can enter another service, thus enabling subscribers to connect with

34. Kaplinsky, *supra* note 27. *ACLU v. Reno*, 929 F. Supp. at 836 (recognizing the ease of Web publishing). Thousands of individuals publish their own personal Web pages. *Id.*

35. On-line service providers provide Internet access for their subscribers. Kaplinsky, *supra* note 27. See CAVAZOS & MORIN, *supra* note 2, at 2 (defining on-line service providers as large computers housing thousands of users at once); see *Yahoo!: Business and Economy:Companies:Internet Services:Internet Access Providers: National (U.S.)*, *supra* note 3 <http://www.yahoo.com/Business_and_Economy...nternet_Access_Providers/National_U_S/> (providing a list of U.S. on-line service providers); see *Yahoo!:Regional: Countries:United Kingdom:Business and Economy:Companies:Internet Services:Internet Access Providers*, *supra* note 3 (listing U.K. on-line service providers).

36. Kaplinsky, *supra* note 27.

37. Kaplinsky, *supra* note 27.

38. *ILC Glossary*, *supra* note 26. All users receive an address and user name so that mail can be addressed and sent to one's personal electronic mail box. CAVAZOS & MORIN, *supra* note 2, at 5. A message remains in the user's mailbox until the user logs on and reads the message and deletes, stores, or reroutes the message to other users. Kaplinsky, *supra* note 27. By use of a mailing list, individuals can send e-mail to one address, upon where their communication is copied and sent to any other subscribers of the mail list. *ILC Glossary*, *supra* note 26.

39. *ILC Glossary*, *supra* note 26.

40. See *infra* note 217 and accompanying text (discussing how the tort of defamation occurs where the statement is published, i.e., where it is read by third parties). Because a message can be sent to thousands of people at once in various parts of the world, it can therefore be read in many countries at once, meaning that the tort is occurring simultaneously all over the world. *Id.*

41. Posting is the method by which single messages are entered into a computer communications system. *ILC Glossary*, *supra* note 26.

42. CAVAZOS & MORIN, *supra* note 2, at 6. This is similar to graffiti on bathroom walls where different people comment on a particular subject. *Id.* USENET newsgroups allow anyone to become a subscriber, thus for all purposes the messages are open for viewing by the public. Kaplinsky, *supra* note 27.

people from various countries and continents.⁴³ In some systems, messages are sent to a central area where a moderator scans them for content.⁴⁴ Other systems, such as *USENET*,⁴⁵ a worldwide system of discussion groups known as *newsgroups*,⁴⁶ do not scan or moderate message content.⁴⁷ Users can post a message to a newsgroup which will be communicated to other newsgroup users around the world; users are forewarned that they are posting their message globally.⁴⁸ Because the numerous public message systems remain ungoverned,⁴⁹ the potential for widespread defamation looms large.⁵⁰

III. CURRENT DEFAMATION LAW IN ENGLAND AND THE UNITED STATES

Few people doubt individuals are legally responsible for what they say over the Internet and can be sued for libel.⁵¹ If service providers exercise control over

43. Kaplinsky, *supra* note 27. Most on-line service providers provide access to USENET newsgroups. *Id.*

44. Kaplinsky, *supra* note 27.

45. See *ILC Glossary*, *supra* note 26 (describing USENET as a global system of discussion groups).

46. See *ILC Glossary*, *supra* note 26 (providing that newsgroups are the discussion groups found in USENET).

47. See *CAVAZOS & MORIN*, *supra* note 2, at 6 (stating that USENET does not scan for message content). See *ILC Glossary*, *supra* note 26 (defining USENET as a world-wide system of discussion groups, with messages passed among hundreds of thousands of computers). There are over 10,000 discussion groups called *newsgroups*. *Id.* Newsgroups are normally organized according to subject matter. Kaplinsky, *supra* note 27. See *USENET Posting Tips*, which pops up on a user's screen whenever the user tries to post or respond to a message on USENET (advising that the user should only post to newsgroups best suiting the subject matter of their communication since USENET is organized by subject). See e.g. *Yahoo!—News:Usenet:Public Access Usenet Sites* (visited on Sept. 29, 1996 and on file with *The Transnational Lawyer*) <http://www.yahoo.com/News/Usenet/Public_Access_Usenet_Sites?> (providing the option to view a list of newsgroups).

48. See *USENET Posting Tips*, *supra* note 47 (asking senders of communications to USENET "Are you sure you want to post your message to thousands of computer systems around the world?"). The user may choose "yes" or "no." *Id.*

49. See e.g., *About Netcom* (visited Sept. 28, 1996 and on file with the *Transnational Lawyer*) <<http://www.netcom.com/about/protectcopy.html>> (stating that NETCOM does not control the content of newsgroup communications, but rather acts as a conduit transferring the information between USENET servers and users); see also *Yahoo!—News:Usenet:Public Access Usenet Sites*, *supra* note 47 (providing the option to view a list of uncensored news servers).

50. It can be inferred that if the messages are not scanned for content, the likelihood of defamatory statements getting through is greater. This result should be balanced against the interests of service providers, at least in the United States, who, by monitoring content, subject themselves to greater liability. See *supra* note 7 (discussing the *Prodigy* case). When on-line discussions involve personal attacks against the participants, a *flame war* has erupted. *ILC Glossary*, *supra* note 26. "Flame" refers to any kind of derogatory comment. *Id.*

51. See Jon Weiner, *supra* note 12, at 23 (discussing the Australian case of *Rindos v. Hardwick* where an individual was held responsible for his words communicated via the Internet); see also Glenn Groenewold, *The Net Meets the Law: The Legalities of Information Transmission: Rules of the Game*, 12 *UNIX REV.*, Dec. 1994, at 79, available in *LEXIS News Library*, *AsapII* File (stating that individuals can be sued provided their identity is ascertained); *Proposed UK Libel Law Poses Threat to Internet Service Providers*, *supra* note 7 (noting the first Internet libel suit in the UK, which was between two individuals); Richard Shilito & Oswald Hickson Collier, *Making Bones of Sticks and Stones--a Revolution in Computerized Publications Libel and*

content, then under current law, they will be held liable as publishers of defamatory material.⁵² In the United States, distribution of a defamatory statement through an on-line service is considered publication of the statement for purposes of libel law,⁵³ and the retransmittal of a statement by another person appears to be a republication.⁵⁴ This section focuses briefly⁵⁵ on what constitutes a defamatory statement, libel, the requisite elements in a cause of action, and the requirements for publication and republication.

A. England

1. Introduction

In England, a statement constitutes libel if it is in writing or some other permanent form.⁵⁶ In a libel cause of action, the plaintiff has the burden of proving three elements: (1) that the statement complained of is defamatory; (2) refers to the plaintiff; and (3) has been published to a third party.⁵⁷ Two presumptions exist in favor of the plaintiff. The first is that the allegedly defamatory statement is un-

Slander Cases and the Reluctance to Inform Juries of Awards Reassessed by the Court of Appeal, 91 L.SOC. GAZETTE, Oct. 19, 1994, at 20, available in LEXIS Ukjnl Library, Alljnl File (addressing the Australian case of *Rindos v. Hardwick* as well as the first Internet libel suit in the UK, both of which involved individuals); *Wright & Mitchell*, *supra* note 7 (discussing *Suarez Corp. v. Meeks*, an Internet libel suit against an individual which was settled out of court). One can transmit his statements to a host in Finland which will then retransmit the statements to the speaker's desired destination under an anonymous identifier. *Kaplinsky*, *supra* note 27. In such a situation, the defamer would be unidentifiable. *Id.*

52. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, at *10. *See Braithwaite*, *supra* note 4 at 1216 (distinguishing those service providers who are liable for defamation from those who are not based on whether they exercise editorial control over content); *see also Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (treating service providers who don't know, nor have reason to know of defamatory publications, as non liable distributors). *CompuServe* is viewed basically as a library with access to publications for a fee. *Id.*

53. *Advertising in Cyberspace*, *supra* note 8, at 1 (explaining how anyone connected to the Internet who accesses a statement can retransmit it instantaneously to other people absent awareness or permission by the original publisher). Even if the original publisher removed her statement immediately, there is no guarantee the statement won't be republished globally to others. *Id.* *See infra* note 155 and accompanying text (discussing republication under U.S. law); *see infra* note 72 and accompanying text (addressing republication under English law).

54. *Advertising in Cyberspace*, *supra* note 8, at 1.

55. This comment focuses on jurisdiction to adjudicate a case, thus the other areas are brief.

56. *PETER F. CARTER-RUCK, LIBEL AND SLANDER* 49 (1973); *see Proposed UK Libel Law Poses Threat to Internet Service Providers*, *supra* note 7 (discussing the first electronic libel case in England stemming from statements made in an on-line discussion group). This illustrates that writing of an electronic nature constitutes libel. *Id.*

57. *CARTER-RUCK*, *supra* note 56, at 50.

true. The second is that the plaintiff has suffered damage as a result of the statement.⁵⁸

2. The Statement Must be Defamatory

The first element a plaintiff must prove in a libel cause of action, is that the statement complained of is defamatory.⁵⁹ A statement must affect a person's reputation in order to be defamatory.⁶⁰ Plaintiffs only need to show that the statement complained of *tends* to defame them; it is not necessary that those who received the statement in fact think less of them.⁶¹ The standard is whether the

58. CARTER-RUCK, *supra* note 56, at 50. The defendant has the burden of repudiating these presumptions, i.e. the defendant must prove the truth of the statement as well as lack of damages. *Id.* Furthermore, the defendant's intent when making the statement is irrelevant unless she relies on the unintentional defamation defense in § 4 of the Defamation Act of 1952. *See infra* note 85 and accompanying text (relying the necessary requisites for a defense based on unintentional defamation).

59. *See supra* note 57 and accompanying text (listing the plaintiff's burden of proof in a defamation suit).

60. CARTER-RUCK, *supra* note 56, at 53. For example, assume that a newspaper article states, without proper foundation, that a business person ceased engaging in that business. This may yield great financial loss, but it does not suggest the person is unqualified for the profession or affect the person's reputation and thus does not give rise to a defamation action. *Id.* The standard applied is whether the statement tends to yield a negative impression in the minds of fair and reasonable persons whose standard of opinion is one the law will recognize). *Id.* at 54. *See* Scott v. Sampson, [1882] 8 Q.B.D. 491, 503 (providing that a statement is considered defamatory if it tends to lower a person in the eyes of right thinking members of society). To be libelous, the words must reduce the plaintiff's reputation among all right thinking people, not just a section of the community. *Byrne v. Deane*, [1937] 1 K.B. 818, 2 All E.R. 204, 206. The United States differs with regards to size of the group considered. *See, e.g., Byrne v. Deane*, [1937] 1 K.B. 818, 2 All E.R. at 206-07 (proclaiming that it is not defamatory to say of a club member that he provided information to the police which lead to the conviction of club officials, since there is a presumption that all citizens will aid in upholding the law). *See* CARTER-RUCK, *supra* note 56, at 51 (stating that a statement is defamatory if it causes people to avoid the subject of the statement, or subjects them to hate, ridicule, or contempt, or which tends to discredit them in their line of business). The tendency of a statement to harm persons in their trade or business is clear where the statement discredits them by stating that they are dishonest or says that they lack a quality pertinent to the trade or business in which she is engaged. CARTER-RUCK, *supra* note 54, at 52. For example if one states to a third party that a specific attorney does not know the law, this would tend to discredit the attorney in her practice by essentially saying that she is unqualified, and thus the statement would constitute libel. *Id.* In addition, allegations of financial hardship about certain persons in business have been viewed as libelous since financial ability is essential for running a business. *See Jones v. Jones* [1916] 2 A.C. 481, 507 (providing the judgment of Lord Wrenbury). The standard used in the trade or business context is whether the statements discredit the plaintiff, while considering the particular trade, business, or profession at issue. *Id.* at 507-509. In *Drummond-Jackson v. British Med. Ass'n*, [1970] 1 All E.R. 1094 (regarding a published article criticizing a technique developed by the plaintiff, a dental surgeon, and stating that the technique was detrimental and even fatal in some cases). The court denied defendant's application to strike plaintiff's claim as stating no cause of action since the article was capable of bearing a defamatory meaning and it's up to the jury to decide if attack on the technique involves an attack on the plaintiff's reputation. *Id.*

61. CARTER-RUCK, *supra* note 56, at 51. In fact, a person can be defamed even though receivers *know* the statement is untrue. *Id.*

statement would reflect badly on the plaintiff in the eyes of reasonable, fair persons.⁶²

In determining the meaning of the words in an allegedly libelous statement, the standard is whether a reasonable person reading it would find it defamatory to the plaintiff.⁶³ The reasonable person is permitted to consider the circumstances surrounding the publication and to draw inferences from them.⁶⁴ For example, in a lawsuit against an English newspaper, an English court allowed the jury to consider such circumstances as the prominence given to the item by the newspaper, the use of bold type for the article title and the popularity of the newspaper.⁶⁵

3. Identification

The second element a plaintiff must establish to meet the burden of proof for libel is that the statement complained of refers to the plaintiff.⁶⁶ The test is

62. CARTER-RUCK, *supra* note 56, at 51.

63. *Lewis v. Daily Tel. Ltd.*, [1963] 2 All E.R. 151, 154. The defendant's intended meaning is irrelevant. *Id.* When the words are capable of conveying several possible meanings, the judge decides as a matter of law whether the words can possibly bear the defamatory connotation the plaintiff alleges. *Id.* The test is whether a reasonable person would comprehend the words in the same manner as the plaintiff believes them to convey. CARTER-RUCK, *supra* note 56, at 57. *See Hart v. Wall*, [1877] 2 C.P.D. 146, 149 (ruling where words are capable of two meanings, only one of which is defamatory, the jury determines the manner in which the words were used). *But see Capital & Counties Bank v. Henty*, [1880] 5 C.P.D. 514, 541 (stating where there are several viable interpretations of the words in issue, it is unreasonable to focus on the unfavorable interpretation). Before the Defamation Act of 1952, a person using innuendo could be defenseless in a legal action when some words might be considered defamatory. CARTER-RUCK, *supra* note 56, at 58. Since the Defamation Act of 1952, a plaintiff desiring to rely on a hidden meaning must follow the requirements in order 82, rule 3(1) of the Rules of the Supreme Court. *Id.* The plaintiff pleading an innuendo must specify all facts and circumstances that support his allegation in a separate paragraph of the claim. 1 THE SUPREME COURT PRACTICE 1321 (Sir Jack I.H. Jacob et al. eds., 1991). If only persons with special knowledge of the circumstances understand the defamatory meaning of the words, then plaintiffs must provide particulars of these persons and circumstances in their statements of claim. *Fullam v. Newcastle Chronicle & Journal Ltd.*, [1977] 3 All E.R. 32, 35 (C.A.). When the words involve slang or are of a foreign language, and there is doubt as to their meaning, the plaintiff should plead an innuendo to ensure consideration of alleged meaning by the judge. *See CARTER-RUCK, supra* note 54, at 58 (providing a case example where the judge refused to provide the jury with a requested interpretation of a particular expression since the plaintiff failed to plead an innuendo to that effect).

64. *See CARTER-RUCK, supra* note 56, at 56 (stating that the sting of a defamatory statement is often the inferences to be drawn from the words); *see e.g., Lewis v. Daily Tel. Ltd.*, [1963] 2 All E.R. at 154 (illustrating that it may not be libelous to say that a person's affairs were being inquired into, but specifying that it is the City Fraud Squad making the inquiry is different). *Id.* The sting in this example comes from the inference to be drawn from reference to the Fraud Squad. *Id.*

65. *English & Scottish Co-op Properties Mortgage & Investment Society Ltd. v. Odhams Press Ltd.*, [1940] 1 All E.R. 1, 4-7. The defendant newspaper wrote an article about court proceedings, entitling it "False Profit Return Charge Against Society." *Id.* at 4. In determining the interpretation to be given to the words 'False Profit,' the court permitted the jury to consider circumstances such as the prominence given to the item and the bold type used in the heading. *Id.* at 4-7.

66. *See supra* note 57 and accompanying text (listing the plaintiff's burden of proof in a defamation suit). The plaintiff must state in his claim that the words can be reasonably interpreted as referring to him. CARTER-RUCK, *supra* note 56, at 52-53. *See Knupffeer v. London Express Newspaper Ltd.*, [1944] 1 All E.R.

whether the words used would reasonably lead persons acquainted with the plaintiff to believe the plaintiff is the person to whom the words refer.⁶⁷

4. Publication

The final element of libel required of a plaintiff is proof that the complained of statement has been published to a third party.⁶⁸ Any persons involved in a defamatory communication to a person, other than the defamed, can be found responsible for publishing a defamatory statement, no matter how insignificant he is in the chain of command.⁶⁹ The one exception to this rule is if persons accused are able to establish themselves as an innocent disseminator of the information.⁷⁰ Furthermore, people who permit a defamatory statement to remain on premises under their control may be liable for defamation.⁷¹

Original publishers of a libelous statement are liable if they authorize another to republish the statement or if republication is the natural and probable result of the original publication.⁷²

495, 498-99 (explaining the requirements for plaintiffs wanting to bring a cause of action on behalf of themselves when the statement was written about a class of people). A member of a class cannot claim that the statement was written about him unless: (1) the class is so small or so identifiable that what is said about the class is necessarily said of every member; or (2) the words, under the circumstances involved, in fact refer to a particular individual. *Id.* The factors considered in determining if reasonable persons would find the words refer to the particular plaintiff are: (1) the size of the class; (2) the generality of the charge; and (3) the extravagance of the accusation. *Id.* at 499.

67. *Morgan v. Odhams Press Ltd.*, [1971] 2 All E.R. 1156, 1164-1165. Whether the defendant intended to refer to the plaintiff is irrelevant. *See Newstead v. London Express Newspaper Ltd.* [1939] 4 All E.R. 319, 322 (specifying that if the jury finds that reasonable persons would have understood the words in question to refer to the plaintiff, then the fact that the defendant intended the words to refer to and were true of another person provides no defense).

68. *See supra* note 57 and accompanying text (listing the plaintiff's burdens of proof in a defamation suit). The wrong in a libel case is not the writing of the words, but the communication of them to third parties. *CARTER-RUCK, supra* note 56, at 76. This communication is termed "publication." *Id.* at 76.

69. *See CARTER-RUCK, supra* note 56, at 76 (maintaining that in regard to a book, those who have been held liable include the publisher, author, printer, press operator and distributor).

70. *See Annotated British, Commonwealth and European Cases*, 32(1) THE DIGEST §2352 at 242 (discussing *Sun Life Assurance Company v. W.H. Smith and Son Ltd.* [1934] 150 L.T.R. 211). The mere distributor who is neither the author, printer nor original publisher of the statement cannot be held liable, provided the court is satisfied that: (1) the defendant did not know the document at issue contained, nor was likely to contain, a libelous statement, and (2) such ignorance had nothing to do with any lack of care on the defendant's part. *Id.*

71. *Byrne v. Deane*, [1937] 2 All E.R. at 206-207 (stating that when proprietors of a club allow a defamatory statement to remain on the wall of their club, they are in essence consenting to it remaining on the wall).

72. *Speight v. Gosnay*, [1891] 60 Q.B. 231; *see e.g.*, *Parkes v. Prescott*, [1869] 17 W.N. 775. This case surrounded a board of guardians meeting in the presence of the press where statements were made against the plaintiff. *Id.* Before the meeting, defendant chairman expressed his desire, and verbally approved of another chairman's wish, that the press take notice of the specific scandal. *Id.* The press only printed what it was asked to, and thus the defendant chairman, in a suit by the plaintiff, was held liable for the publication by the press. *Id.*

In certain cases, English law will presume a publication unless there is evidence to the contrary.⁷³ Such a situation exists in the case of a postcard, which by its nature is open for reading and understanding by anyone through whom it passes in the normal course of the mail route.⁷⁴ This presumption may be rebutted with proof that no one other than the addressee read the postcard; however it is virtually impossible to prove this.⁷⁵

Every publication of libel provides a new cause of action.⁷⁶ Thus, if a defamatory statement is published in several newspapers, it is not a defense to claim that a particular publication is merely repeating something already published in another document.⁷⁷

5. Defenses

The following are primary defenses to defamation actions: justification, fair comment, absolute privilege, qualified privilege, unintentional defamation and apology with payment into the court.⁷⁸

Justification is a complete bar to liability provided the defendant can prove the allegedly defamatory words are true in fact and substance;⁷⁹ there is no justification for a statement because it is phrased in the form of opinion.⁸⁰ However, the defense of fair comment protects true expressions of opinion on matters of public interest.⁸¹ Absolute privilege is provided for all statements and reports

73. CARTER-RUCK, *supra* note 56, at 79.

74. See *Huth v. Huth*, [1915] 3 K.B. 32, 39 (C.A.) (explaining that the court takes judicial notice of the nature of the document, such as a postcard, and absent evidence to the contrary, presumes it has been read by others); see also [1936] *Sim v. Stretch*, 2 All E.R. 1237 (noting that the law will presume publication when one sends a telegram); *Sadgrove v. Hole*, [1901] 2 K.B. 1, 306 (C.A.) (emphasizing that for the presumption of publication to aid a plaintiff's case, there must be enough information to identify the plaintiff as the subject referred to in the postcard).

75. See *Huth v. Huth*, 3 K.B. at 39 (stating that it is difficult to imagine that proof could be given to show not a single person read the postcard).

76. CARTER-RUCK, *supra* note 56, at 80.

77. *Id.* at 81.

78. *Id.* at 105.

79. *Id.* at 105-106. See *Wakely v. Cooke*, [1849] 4 Ex. 511, 512-513 (illustrating the statement 'X is a libelous journalist' can be justified by proof that judgement was entered against the plaintiff in a libel action).

80. CARTER-RUCK, *supra* note 56, at 109-10 (providing if the statement is phrased as "I believe [X] is a swindler," it is not sufficient to establish the statement as true belief). The defendant must prove that the statement is true in fact for a defense based on justification. *Id.*

81. See *id.* at 117 (explaining it is a complete defense when words are "fair comment made in good faith and without malice on a matter of public interest"). This defense is available for individuals as well as newspapers and writers. *Id.* The "comment" must appear as an opinion. *Id.* When there is a question of whether the words are comment or fact, the judge will send the issue to the jury if the words are reasonably capable of being a comment. *Id.* at 118. The requisite proof is: (a) the subject matter is of legitimate public interest; (b) the statement is based on true facts rather than a belief; and (c) the comment is fair because it is relevant to the facts and it is the honest opinion of the writer. *Id.* at 118. Areas of legitimate public interest include: matters of government and public administration; the public conduct of politicians or those seeking to hold public office; and entertainers' performances, provided the comment does not involve personal attacks. *Id.* at 119.

made during and on parliamentary, court and state proceedings.⁸² Qualified privilege exists when public interest demands protection for statements made on a particular occasion.⁸³ Unlike absolute privilege, proof that the defendant made the statements with malice defeats the defense of qualified privilege.⁸⁴ The defense of unintentional defamation exists to protect persons from consequences of publishing statements that were innocent when published, but which subsequently become defamatory for reasons unknown to the author at the time of publication.⁸⁵ Apology with payment into the court, mainly a defense to benefit newspapers, provides a defense if the newspaper can show that it offered or published an apology and made a payment to the court.⁸⁶

6. Remedies

The remedies available for a defamed plaintiff include damages and injunctive relief.⁸⁷ Damages compensate the plaintiff for harm.⁸⁸ The court will issue injunctive relief to restrain publications of libel when it feels absent an injunction, the defendant will continue to publish the material.⁸⁹

82. *Id.* at 130. For application of the defense of qualified privilege, *see generally id.* at 137-156 (describing the occasions where qualified privilege exists).

83. *Adam v. Ward*, [1917] A.C. 309, 348 (H.L.). Occasions for availability of qualified privilege include statements: (1) which occur while performing a legal, moral or social duty; (2) made in furtherance or protection of a public or private interest; (3) made in protecting a common interest; (4) made in certain reports, such as those on parliamentary and judicial proceedings and those privileged under the Defamation Act of 1952. CARTER-RUCK, *supra* note 56, at 137-38. For a more in-depth discussion of the qualified privilege, *see id.* at 137-56.

84. CARTER-RUCK, *supra* note 56, at 137.

85. *See generally* Defamation Act, 1952, § 4 (setting forth the defense of Unintentional Defamation). The defendant's burden of proof consists of showing that he and any agent concerned with the contents of the publication exercised all reasonable care with regard to the publication. CARTER-RUCK, *supra* note 56, at 66. There are two categories where this defense comes into play: (1) the statements were not intended to refer to the plaintiff, and (2) the statements intended to refer to a real person, which for reasons unknown to the defendant, are defamatory to this person or to some other person. *Id.* at 164. *See id.* at 164-70 (providing details and procedures for this defense).

86. *See* CARTER-RUCK, *supra* note 56, at 169 (explaining the defense of apology with payment into court).

87. *Id.* at 171. The court will issue injunctive relief to restrain publications of libel when it feels that absent an injunction, the defendant will continue to publish the material. *Id.* at 180.

88. *See Id.* at 171 (providing the court has discretion in determining the amount of harm in light of the surrounding circumstances). Punitive damages are available since a lump sum is awarded from which it is difficult to determine the amount awarded as compensation as opposed to punishment. *Id.* at 172.

89. *Id.* at 180.

7. Analogies to the Internet

As stated earlier, the tools available via the Internet with which an individual can publish are e-mail, a news or discussion group, and a WWW page.⁹⁰

Again, according to English law, publication is achieved by communicating a statement to a third party.⁹¹ Thus, if the sender of e-mail communicates a defamatory statement to the third party addressee, that communicated statement constitutes a publication for purposes of England's defamation law.⁹² In addition, due to the global nature of the Internet, publication may occur in various countries simultaneously.⁹³

a. Example 1

An interesting issue is whether publication occurs when the sender's defamatory statement is e-mailed only to the subject of the statement. In this situation, the sender does not intend to send the e-mail to third parties, but this may be the result. Sending an e-mail message is analogous to sending a postcard via the regular postal mail.⁹⁴ Remember, in England, the law will presume a publication in the case of a postcard since, by its nature, it is open for reading and understanding by anyone who views it in the normal course of the mail route.⁹⁵ To understand why an e-mail message is analogous to a postcard, it is necessary to comprehend what happens to the e-mail message between the time it is sent from the sender and the time it arrives at the addressee.

By design, the Internet has ways of routing pieces of information, like e-mail, via many different paths. Currently, most e-mail messages are not encrypted, and they pass through a vast array of private and public networks to reach their final

90. See *supra* notes 32-50 and accompanying text (describing the modes of communication for Internet users).

91. See *supra* note 69 and accompanying text (providing what constitutes publication for English libel law purposes).

92. Since publication is defined as communication to a third party, e-mail messages communicated to third parties will constitute publication for purposes of defamation law.

93. See *supra* notes 32-36 (discussing the global nature of the Internet).

94. See *supra* note 94 and accompanying text (referring to a postcard as open to all those who handle it during the course of the mail). E-mail messages are likewise open and can be observed by third parties in transit. *On Screen Warning Appearing via Submission of Unencrypted Information Using Netscape 3.0* [hereinafter *On Screen Warning*] (screen shot available on file with *The Transnational Lawyer*). Other browsers provide similar warnings. Kaplinsky, *supra* note 27. See *supra* note 33 and accompanying text (discussing the function of a browser); see also *Password Sniffing*, (visited Oct. 23, 1996 and on file with *The Transnational Lawyer*) <<http://www.ceas.rochester.edu:8080/Security/node8.html#SECTION00031200000000000000>> (providing that all messages sent by computer can be read by any other computer along the network). Computers can be programmed to view every message on the network, even those not intended for a particular user. *Id.*

95. See *supra* note 74-75 (discussing the presumption of publication, under English libel law, for postcards and telegrams).

destinations.⁹⁶ In fact, a message from a particular sender to the same addressee might travel a different path every time.⁹⁷ At any point along the route where the path has the option of changing (analogous to turns in a road), a person or entity can read the information flowing through the network with a device known as a “sniffer.”⁹⁸

Since postcards are considered open enough for a presumption of publication, so should e-mail since there is an even greater opportunity for more people to read e-mail messages through the Internet than postcard messages traveling through the regular mail route. As with a postcard, one could rebut the presumption of publication by proving only one person, the addressee, received the message. However, it is virtually impossible to determine if a particular item of information has been captured along its ever changing route along the Internet.⁹⁹

In order to rebut a presumption of publication, users should encrypt their messages.¹⁰⁰ Utilizing encryption, no one but the original sender and intended receiver with their digital signatures¹⁰¹ can read the messages, which renders “sniffers” useless.¹⁰² Someone using a “sniffer” would merely receive encrypted information that is virtually impossible to interpret.

b. Example 2

Again, in determining the meaning of words in an allegedly libelous statement, the standard is whether the reasonable person would find it defamatory.¹⁰³ English law permits the reasonable person to consider circumstances surrounding

96. Interview with Alexander Kaplinsky, Vice President of USWeb NetWORKERS Web Consulting, Inc. (Oct. 10, 1996).

97. *Id.*; see *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (providing communications sent over the Internet can travel several routes to its destination).

98. *On Screen Warning*, *supra* note 94 (warning that any information submitted via the Internet can be observed by a third party in transit, so if communicators wish to keep their message private, it would be safer to cancel the transmission); see also *Password Sniffing*, *supra* note 94 (providing that all messages sent by computer can be read by any other computer along the network). Computers can be programmed to view every message on the network, even those not intended for a particular user. *Id.* Hackers have programs to scan all the messages traversing a network. *Id.*

99. See *supra* notes 74-75 and accompanying text (stating that since it is almost impossible to prove no one read a postcard along the mail route, it is virtually impossible to rebut the presumption of the publication); cf. Kaplinsky, *supra* note 96 (noting that there is no way to determine if a message has been scanned along its route since the specific route traveled is indeterminable).

100. Kaplinsky, *supra* note 96.

101. Though not all encryption is digital, most are. *Id.* The examples in this comment relate to digital encryption.

102. *Id.* If a message is encrypted, rather than an on screen warning regarding insecurity of transmissions, there will be a message stating the sender's transmission is secure. *On Screen Warning*, *supra* note 94.

103. See *supra* notes 63-65 and accompanying text (setting forth the standard for determining the defamatory nature of a communication).

the publication.¹⁰⁴ The ability to be creative in designing Web pages, and the titles that one can give to e-mail messages or statements on a newsgroup, opens the door to a vast array of surrounding circumstances to be considered by the reasonable person.¹⁰⁵ Such circumstances may include the title of the page, the font utilized with certain words along with the prominence given to particular items of text; various graphic techniques; and the words submitted to the search engines.¹⁰⁶

The following example focuses on Web pages, which can be easily published by anyone desiring presence on the WWW.¹⁰⁷ Once a page is published, the creator may submit certain words to a "search engine" to ensure viewing by the Internet community.¹⁰⁸ Whenever an Internet user enters those specific words, the creator's page will be referenced.¹⁰⁹

Because of the ease of publication on the WWW, it is comprehensible how the publisher can be subject to libel law given that English law permits the reasonable person to consider the circumstances surrounding the publication.¹¹⁰ For example, assume John Doe publishes a WWW page, on which the statement "Management Consultant Roger Art REALLY Knows What He's Talking About." On its face, this message seems to be quite innocent. However, assume that the word "REALLY" is blinking. In addition, assume that the phrase submitted to the search engine operator is "Security Fraud." Thus, every time a user seeks to retrieve information on security fraud, the message "Management Consultant Roger Art REALLY Knows What He's Talking About," with "REALLY" blinking, is retrieved. Now the statement has a completely different meaning. Not only can it be viewed as sarcasm due to the font and emphasis on

104. See *supra* notes 64-65 and accompanying text (discussing English & Scottish Co-op Properties Mortgage & Investment Society Ltd. v. Odhams Press Ltd., [1940] 1 All E.R. 1, at 4-7).

105. See *supra* notes 64-65 and accompanying text (providing the reasonable person may consider circumstances surrounding the publication and draw inferences from them).

106. See Kaplinsky, *supra* note 96 (describing various techniques in designing WWW pages, and transcribing e-mail and discussion group messages). See *infra* note 108 (noting the purpose of search engines).

107. Many people have a desire to talk to the world or prove their presence among the Internet community; the WWW is the medium of choice. It is extremely easy for people to publish their own Web pages. Kaplinsky, *supra* note 96. Many on-line service providers give their subscribers a place to house personal Web pages. *Id.* Anyone who can use a word processor can make a Web page and, with the help of an on-line account with a service provider, can put a personal Web page onto the Internet for the world to view. *Id.*

108. Search engines, such as "Yahoo," "Excite," and "Altavista," exist to aid Internet travelers find what they are looking for. Kaplinsky, *supra* note 96. For example, a user wishing to find out about the over the counter drug melatonin used for insomnia, can type in "melatonin" or "sleep" at the search engine prompt, and all references to pages discussing the drug will be retrieved. *Id.* In addition, if the WWW page creator wants his page to come up every time a user enters "flowers" to a search engine prompt, he only needs to submit the word to the search engine operator. *Id.* To find the above search engines, see <<http://www.Yahoo.com>>, <<http://www.Excite.com>> and <<http://www.Altavista.com>> (visited Oct. 10, 1996).

109. See *supra* note 108 (illustrating how search engines work).

110. See *supra* notes 64-65 and accompanying text (setting forth that English libel law permits the reasonable person to consider the circumstances surrounding the publication and draw inferences from them).

"REALLY," but the Web page author is essentially saying that Roger Art is involved with securities fraud.

An examination of the components of an e-mail message or communication to a newsgroup likewise illustrates the potential for liability in light of surrounding circumstances. When a sender transmits an e-mail message, there is a box on the screen entitled "subject title." In this location, a sender has the option of entitling the e-mail. In addition, there is an area designated "subject matter" wherein the communicator may jot a short statement regarding the subject matter of the message. Imagine an e-mail message which contains "broker is a fraud" as the subject title, while the subject matter is illustrated by "John James is an excellent broker." The actual text of the message talks about John James as a wonderful broker, and thus the message seems innocent and nondefamatory. However, the title attached to the message implies that the message is sarcastic and, in effect, implies that John James is a fraud, and thus can be found defamatory.

This same example illustrates potential liability for communications in newsgroups. Newsgroups are organized by subject matter.¹¹¹ For example, there may be a news server entitled "news.brokers."¹¹² A person who enters this group would see several users' views and opinions on brokers generally. Individuals desiring to express themselves in the news.brokers newsgroup would write a short statement in the subject column describing the essence of their message; this is to enable other participants in the newsgroup to decide if they wish to view the particular message. For example, a sender may write "broker is a fraud" in the subject column. The text of the communication, however, may be patently innocent, stating that "John James is the best broker in the world." Because this statement is prefaced by the description "broker is a fraud," the implication is that John James is a fraud. These examples illustrate how the circumstances surrounding communications via the Internet can subject communicators to potential liability.

111. See *supra* notes 41-50 (discussing discussion groups and Usenet).

112. One utilizing the Netscape browser can go to a page entitled "Netscape News." On this page are two windows: one is entitled "News Server," and the other "Sender" accompanied by a column designated "Subject." The "News Server" window contains several titles illustrating the subject matter of particular newsgroups. Once a particular group is chosen, the user will see the views and opinions of other users on the relevant subject matter. Often there will be responses or elaborations on an individual's message by those who wish to comment.

B. The United States

1. The U.S. Constitution

The First Amendment of the Constitution protects speech.¹¹³ Since defamation actions deter a type of speech, that is, speech which is false and injurious to a person's reputation, defamation law must comport with the Constitutional requirements contained in the Free Speech clause of the First Amendment.¹¹⁴

Historically, U.S. law protected one's reputation regardless of fault in making the defamatory communication.¹¹⁵ Now, U.S. law balances the competing values of the public interest in preserving free speech against an individual's interest in protecting his or her reputation.¹¹⁶

In the United States, to maintain a cause of action for defamation, a plaintiff must establish that the defendant acted in a particular way in publishing the defamatory communication. The requisite degree of proof depends on whether the defamatory statement is classified as one concerning a public official or figure, or a private individual.¹¹⁷

Statements about public officials¹¹⁸ or figures¹¹⁹ normally concern matters of public interest.¹²⁰ Public officials and figures are primarily people with influence who have access to a public medium through which to answer belittling falsehoods.¹²¹ Public officials and public figures wishing to maintain a libel cause of action must establish that the defendant acted with actual malice.¹²² Actual malice exists when the defendant acts with knowledge of the falsity of the statement or with reckless disregard as to the truth of the statement.¹²³ Reckless disregard is synonymous to acting with serious doubt as to the truth of a statement.¹²⁴ The

113. U.S. CONST. amend. I.

114. J. CLARK KELSO, UNFAIR TRADE PRACTICES LITIGATION § 8.20 at 42 (Michie Co. 1995) [hereinafter KELSO].

115. PROSSER & KEETON, *supra* note 22, § 113, at 804.

116. *Id.*

117. *See infra* notes 117-28 and accompanying text (providing the burden of proof for a public official or figure as compared to a private individual).

118. Public officials are government employees who, because of their position, "the public has an independent interest in the qualifications and performances of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees." KELSO, *supra* note 114, § 8.20, at 45 n.183 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

119. KELSO, *supra* note 114, at § 8.20, at 46 n.188 (providing public figures are persons who, because of their position or because they voluntarily inject themselves into the center of public life, are valid subjects of public interest).

120. PROSSER & KEETON, *supra* note 22, § 113, at 805.

121. *Id.*

122. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

123. PROSSER & KEETON, *supra* note 22, § 113, at 806.

124. *See* KELSO, *supra* note 114, at § 8.20, 53.

reason a defendant will be liable is that the First Amendment has no interest in protecting speech consisting of communications made with actual malice.¹²⁵

Private individuals, unlike public officials and figures, have less opportunity to answer defamatory statements since they have limited access to public mediums of communication.¹²⁶ Additionally, private individuals, unlike public officials and figures, do not voluntarily inject themselves into public life.¹²⁷ To maintain a balance between First Amendment rights and a state's interest in providing compensation to private persons for injuries to their reputation, states retain the power to determine the degree of fault a private plaintiff must establish, so long as it is, at a minimum, negligence.¹²⁸

2. The Cause of Action

Libel is a branch of defamation law that involves the publication of a defamatory statement in the form of written or printed words, its embodiment in physical form, or any other form with the harmful qualities attributable to written or printed words.¹²⁹

To sustain a cause of action for libel, a private person¹³⁰ must prove: (1) a statement that is false and defamatory;¹³¹ (2) a nonprivileged¹³² publication about

125. *Id.*

126. *Id.* at 49.

127. *Id.*

128. *See infra* notes 159-160 and accompanying text (discussing requisite degree of fault for a defendant who publishes a defamatory statement about a private individual).

129. RESTATEMENT (SECOND) OF TORTS § 568 (1977). Slander, the other branch of defamation law, is the publication of defamatory matter by spoken words or transitory gestures. *Id.* Defamation on the Internet will most likely be libel. CAVAZOS & MORIN, *supra* note 2, at 78. *See* BLACK'S LAW DICTIONARY 915 (6th ed. 1990) (defining libel as defamation expressed by print, writing, pictures or signs). A communication over the Internet is often in written or pictorial form and remains posted until someone removes the statement. Kaplinsky, *supra* note 27. Video and music are also available. *Id.* This comment focuses on the common modes of communication over the Internet by individuals: e-mail, discussion groups and the WWW. The first two likely involve written communications, with the latter involving written and graphic communications. *Id.*

130. RESTATEMENT (SECOND) OF TORTS § 580B (1977). This comment focuses on private persons. For a more in-depth look at libel law as it applies to public individuals, *see* PROSSER AND KEETON, *supra* note 22, at 771-848.

131. RESTATEMENT (SECOND) OF TORTS § 558 (1977). At common law, the statement was presumed false unless proved true by the defendant. PROSSER & KEETON, *supra* note 22, at 839.

132. *See infra* notes 168-80 and accompanying text (discussing the defense of privilege).

the plaintiff¹³³ to a third party;¹³⁴ and (3) fault at least to a degree of negligence¹³⁵ on the part of the publisher.¹³⁶

a. The Statement Must Be Defamatory

A communication¹³⁷ is defamatory if it harms¹³⁸ the reputation of an individual so as to lower that person in the eyes of the community¹³⁹ or deter others from associating with the person.¹⁴⁰ It is sufficient that the statement would tend to prejudice the individual in the eyes of a substantial minority in the community; it only must be shown that one or more persons actually received the communication.¹⁴¹ In contrast, English law requires the plaintiff's reputation be affected in the eyes of more than a section of the community.¹⁴²

133. See *infra* notes 146-54 and accompanying text (setting forth what constitutes a publication).

134. RESTATEMENT (SECOND) OF TORTS § 558 (1977); see RESTATEMENT (SECOND) OF TORTS § 580B cmt. b (1) (1977) (illustrating that a communication mailed to a defamed person that comes to the attention of a third party is considered a publication for purposes of defamation law). From this it follows that e-mail coming to the attention of a third party qualifies as a publication.

135. See BLACK'S LAW DICTIONARY, at 1032 (defining negligence as failure to do something which a reasonable person guided by ordinary considerations would do). Applied to defamation, negligence would characterize the communication of a statement without first ascertaining the truth of the matter asserted.

136. RESTATEMENT (SECOND) OF TORTS § 558 (1977). See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (regarding how the First Amendment of the Constitution requires fault for liability). Regarding private figures, states can choose the standard of fault they wish to apply, as long as it is not strict liability. *Id.* at 347.

137. See RESTATEMENT (SECOND) OF TORTS § 559 cmt. a (1977) (defining communication to denote the fact that one person has brought an idea to the attention of another).

138. See RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977) (stating it is not necessary the communication cause actual harm to one's reputation or deter others from associating with her, as long as the character of the communication has a general tendency to cause such an effect).

139. A community is "a group with common interests or rights." OXFORD AMERICAN DICTIONARY 171 (Heald Colleges ed. 1980). There is no requirement that the community be geographic in nature. See *Id.*

140. PROSSER & KEETON, *supra* note 22, at § 111, at 774; RESTATEMENT (SECOND) OF TORTS § 559 (1977).

141. RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977); see, e.g., *Peck v. Tribune*, 214 U.S. 185, 190 (1909) (holding words harming a person's reputation in the minds of a considerable and respectable sect of the community, though not the entire community, are libelous). Among Internet users such as e-mailers, communities are formed according to like interests, not locale; thus, a community can consist of members from all over the world. See Shillito & Collin, *supra* note 51, at 20 (stating that the name of the bulletin board in the Rindos case was "DIALx Science anthropology"); Weiner, *supra* note 12, at 23, (stating that 23,000 around the world have access to the board on which the message involved in the Rindos case was posted, most being professional anthropologists and anthropology students); see generally *Rindos v. Hardwick*, W. Austl. Sup. Ct. (unreported judgement 940164) (visited Oct. 1995 and on file with *The Transnational Lawyer*) <<http://Mark.law.auckland.ac.nz/cases/Rindos.html>> (stating that the libel statements involved were posted on bulletin boards, located on an international newsgroup, designated to the subject of anthropology). One can infer that those who access this board are part of a community with the like interest of anthropology.

142. See *supra* note 60 and accompanying text (providing the plaintiff's reputation must be reduced among all, rather than a minority, of the community).

b. Falsity of the Statement

At common law, the statement was presumed false unless the defendant proved it was true.¹⁴³ The current law is that the plaintiff has the burden of pleading and proving that the allegedly defamatory statement is false.¹⁴⁴ This is distinguishable from English libel law which presumes the falsity of the statement.¹⁴⁵

c. Intentional Publication

Publishing a defamatory statement is accomplished by communicating the message to another person.¹⁴⁶ The publisher must do this intentionally or negligently.¹⁴⁷ Furthermore, if persons intentionally or unreasonably fail to remove a statement from an area under their control, they are liable for a publication.¹⁴⁸ The statement must be one of fact rather than opinion.¹⁴⁹ Unlike England, it is insufficient to presume a publication when a defamatory statement is written on a postcard sent through the mail; rather, there must be proof that a third party actually read it.¹⁵⁰

According to the single publication rule,¹⁵¹ a single communication read by more than two persons at once, or a single edition of a newspaper or broadcast is considered one publication, no matter how many people read it.¹⁵² Thus an individual would only have one cause of action against a defamer.¹⁵³ This enables

143. PROSSER & KEETON, *supra* note 22, at § 111, at 839.

144. *See generally* Philadelphia Newspapers v. Hepps, 475 U.S. 767, 769 (1986) (holding that the plaintiff has the burden of proving falsity of the allegedly defamatory statement).

145. *See supra* notes 57-58 and accompanying text (setting forth the plaintiff's burden of proof as excluding proof that the statement complained of is false).

146. RESTATEMENT (SECOND) OF TORTS § 577(1) (1977).

147. RESTATEMENT (SECOND) OF TORTS § 577(1) (1977). Intent is established when the publisher does something with the intent that it will be communicated to a third party or if the publisher is substantially certain that it will be. *Id.* at cmt. k. *See* PROSSER & KEETON, *supra* note 22, § 113, at 803 (explaining that there is no liability if the defendant did not intend and could not reasonably anticipate that a third party would receive the communication).

148. RESTATEMENT (SECOND) OF TORTS § 577(2) (1977). *See generally* Hellar v. Bianco, 111 Cal. App. 2d 424 (1952) (illustrating that a tavern owner who failed to remove a defamatory statement, of which he was aware, written on the bathroom wall was liable for the continued publication).

149. *See* PROSSER & KEETON, *supra* note 22, § 113A, at 813 (stating that U.S. defamation law has always distinguished between a publication of defamatory statement of fact versus opinion).

150. *See id.* at § 113, at 798; *supra* note 74 and accompanying text (providing English law regarding postcards and telegrams).

151. RESTATEMENT (SECOND) OF TORTS § 577A (1977).

152. RESTATEMENT (SECOND) OF TORTS § 577A cmt. c (1977).

153. RESTATEMENT (SECOND) OF TORTS § 577A (4)(a) (1977).

a plaintiff to collect all the damages from a single publication in one suit.¹⁵⁴ On the other hand, every republication of that communication would entitle the defamed to an additional suit against the republisher.¹⁵⁵ England does not recognize the single publication rule, and instead recognizes a new cause of action for every publication.¹⁵⁶

d. Identification

The plaintiff must show the recipient of the communication believes it refers to the plaintiff.¹⁵⁷ If the publication does not patently refer to the plaintiff, she must plead and prove the defamatory meaning of the statement referred to her by way of "colloquium."¹⁵⁸

e. Fault

The First Amendment of the Constitution prohibits imposing liability without fault on a defendant who publishes a defamatory statement about a private person.¹⁵⁹ Each state has the authority to choose the standard of liability to impose on a defendant who publishes a defamatory statement about a private individual.¹⁶⁰ The lowest degree of fault upon which liability is found is negligence.¹⁶¹

154. See generally *Keeton v. Hustler Magazine*, 104 S.Ct. 1473 (1984) (involving a suit for nationwide damages under the single publication rule). Extent of circulation provides evidence as to damages. *Palmer v. Mahin*, 120 F. 737, 747 (8th Cir. 1903).

155. RESTATEMENT (SECOND) OF TORTS § 577A cmt. a, illus. 1 (1977); see *Nance v. Flaugh*, 253 S.W. 2d 207, 207 (Ark. 1952) (illustrating that a person who repeats another person's defamatory quote in a letter is equally defaming the plaintiff). It makes no difference whether a person made up the statement himself or just repeated what he heard. *Id.*

156. See *CARTER-RUCK*, *supra* note 56, at 83 (noting English defamation law does not recognize the single publication rule of the United States, which restricts a cause of action to the original publication).

157. PROSSER & KEETON, *supra* note 22, at § 111, at 783.

158. PROSSER & KEETON, *supra* note 22, at § 111, at 783. See, e.g., *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 182 A.2d 751, 753 (Pa. 1962) (stating that where words are defamatory on their face, it doesn't matter that the plaintiff is not specifically named as long as description or circumstances tend to identify him). It is only necessary that some recipient reasonably believes the statement to refer to the plaintiff. *Fitzpatrick v. Age-Herald Publishing Co.*, 63 So. 980, 982 (Ala. 1913). If reference to the plaintiff would only be understood due to extrinsic circumstances, the plaintiff must show that these circumstances were known to some recipients of the communication who read the defamatory matter and reasonably believed it referred to the plaintiff. *Gnapinsky v. Goldyn*, 128 A.2d 697, 703 (N.J. 1957).

159. See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

160. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347; see RESTATEMENT (SECOND) OF TORTS § 580B, Reporters Notes (1977) (illustrating that most states have imposed a negligence standard of fault).

161. See RESTATEMENT (SECOND) OF TORTS § 580B (1977) (setting forth the situations in which a defendant will be found liable for a defamatory statement). Defendants will be liable only when they: (1) know the statement is false and that it defames the plaintiff; (2) act in reckless disregard of these matters; or (3) act negligently in failing to ascertain these matters. *Id.* Negligence refers to a unreasonable risk of harm; thus in dealing with defamation, the standard has been expressed as whether the defendant acted reasonably in ascertaining the truth or falsity or defamatory nature of the communication before publishing it. *Id.* at cmt. g.

The plaintiff bears the burden of proof.¹⁶² In contrast, English libel law finds intent to defame as irrelevant.¹⁶³

f. Defenses

i. Truth

Proof that the allegedly defamatory statement is true is a complete defense to liability.¹⁶⁴ It is sufficient for the defendant to show the defamatory statement is substantially true.¹⁶⁵

ii. Consent

When the plaintiff consents to the defamatory statement by inviting the statement, there is a policy of denying a request for recovery.¹⁶⁶ The scope of the consent is limited to the particular purpose or publication for which it is provided.¹⁶⁷

iii. Privilege

Privilege permits conduct that would ordinarily be actionable to avoid liability because the defendant's act furthers an important public interest which deserves protection at the expense of harm to the plaintiff's reputation.¹⁶⁸ There are two types of privilege: (1) absolute privilege and (2) qualified privilege.¹⁶⁹ Absolute privilege provides immunity to speakers for their statements made

162. See RESTATEMENT (SECOND) OF TORTS § 580B cmt. j (1977) (stating that there is no doubt that the plaintiff bears the burden of proving fault).

163. CARTER-RUCK, *supra* note 56, at 50.

164. See RESTATEMENT (SECOND) OF TORTS § 580A (1977) (relating that a defendant is not subject to liability for a defamatory statement that is true); see also Fleckenstein v. Friedman, 193 N.E. 537, 538 (N.Y. 1934) (providing no legal harm is done when the statement complained of communicates the truth); PROSSER & KEETON, *supra* note 22, at § 116, at 842 (stating that the defendant doesn't have to prove the literal truth of all the details of his statement, just the substantial truth).

165. See Bell Publishing Co. v. Garrett Engineering Co., 170 S.W.2d 197, 203-04 (Tex. 1943) (implying that defendants showing the statements complained of are substantially true, have a valid defense based on truth).

166. PROSSER & KEETON, *supra* note 22, § 114, at 823; see Burdett v. Hines, 87 So. 470, 470 (Miss. 1921) (holding that plaintiffs consenting to a past employer providing any information to a new employer, get what they asked for and cannot maintain a suit based on a damaging response). Smith v. St. Regis Corp., 850 F. Supp. 1296, 1322 (S.D. Miss. 1994) (affirming the holding in *Burdett*). Plaintiffs who consent by signature to an inquiry into their past work performance and health, are barred from bringing a defamation action based on the results of the inquiry. *Id.*

167. See RESTATEMENT (SECOND) OF TORTS § 583, illus. 1 (1977) (illustrating that when a college fraternity member consents to allowing a defamatory caricature of himself be printed on a menu for a fraternity dinner, the scope of the consent is limited to that purpose).

168. PROSSER & KEETON, *supra* note 22, at § 114, at 815.

169. *Id.* § 114-15, at 815-32.

during and about judicial¹⁷⁰ and legislative proceedings,¹⁷¹ makers of executive communications,¹⁷² political broadcasts¹⁷³ and defamatory communications made according to the plaintiff's consent.¹⁷⁴ Qualified privilege exists in situations where the defendant is attempting to further an interest considered important enough to allow some flexibility for error so that a defamatory publication should be conditionally privileged.¹⁷⁵ The classes of protected interests include: protection of the defendant publishers' legitimate interests,¹⁷⁶ protection of interests of individuals other than the publisher,¹⁷⁷ protection of an interest common to the publisher and others where the publication is likely to further it,¹⁷⁸ protection of communications to an individual who may be expected to act in the public interest,¹⁷⁹ and fair comment on matters of public interest.¹⁸⁰

g. Remedies

Plaintiffs satisfying their burden of proof in a defamation action may recover damages. For public officials or figures to recover compensatory damages, they must establish the defendant acted with actual malice.¹⁸¹ When the plaintiff is a private individual, but the defamatory communication involves a matter of public concern, the plaintiff must prove fault at least to a degree of negligence to recover compensatory damages.¹⁸² In order for this individual to recover any punitive damages, actual malice on the part of the defendant must be established.¹⁸³ On the other hand, when the plaintiff is a private individual, and the content of the

170. *Id.* § 114, at 816-20 (5th ed. 1984). The policy behind this privilege is that a judge must be able to freely administer the law without fear of liability. *Id.* at 816.

171. *Id.* § 114, at 820-21.

172. *Id.* § 114, at 821-23. This privilege extends to governmental executive officers in the course of their duties. *Id.* at 821.

173. *Id.* § 114, at 824. The privilege provides that broadcasts of political candidates shall not be censored. *Id.*

174. *Id.* § 114, at 823. This privilege supports the policy that plaintiffs should not recover for conduct they consent to. *Id.*

175. *Id.* § 115, at 825-32.

176. *Id.* § 115, at 825-26. For example, defendants may publish anything reasonably necessary to defend their reputations against another's defamatory statement. *Id.* This must be done in an appropriate manner. *Id.*

177. *Id.* § 115, at 826. The defendant must believe the publication is reasonably necessary to protect another person and that such person is unable to protect himself. *Id.*

178. *Id.* § 115, at 828-30. A situation where the publisher and recipient of the communication have a common interest is where the parties are members of an organization, such as corporate officers and shareholders of that corporation. *Id.* at 828. In such cases, there is often an obligation to speak. *Id.*

179. *Id.* § 115, at 830-31. This privilege often involves communications to individuals expected to take official action for protection of a public interest. *Id.* at 830.

180. *Id.* § 115, at 831-32. Fair comment refers to opinions about matters in which the public has a legitimate public interest. *Id.* at 831.

181. KELSO, *supra* note 114, § 8.20, at 52.

182. *Id.*

183. *Id.*

communication is not a matter of public interest, the First Amendment permits punitive damages upon proof of fault to a degree of negligence.¹⁸⁴

3. *The Internet*

In order to publish a defamatory statement over the Internet, a user need only intentionally or negligently communicate a statement to a third party,¹⁸⁵ or a Web page host unreasonably fails to remove a defamatory statement, concerning a third party, about which he has knowledge.¹⁸⁶ Thus, transmitting an e-mail message or posting to a newsgroup are activities which can potentially subject one to liability if the communications constitute defamation.¹⁸⁷ WWW pages often provide space for viewer comments.¹⁸⁸ Should these be defamatory, then, as with defamatory messages left on a bathroom wall, the person who controls the WWW page may be liable.¹⁸⁹

If an individual reads a defamatory statement posted on a newsgroup or receives one through e-mail, and then retransmits the statement to a third party or posts it on another newsgroup, this person would be liable as a republisher.¹⁹⁰

C. *Comparison Between England and the United States*

English law is much stricter than U.S. law on the publisher of a defamatory statement. In England, it is not necessary to prove the defendant's intent to defame the plaintiff, whereas in the United States, the Constitution requires the plaintiff to prove some degree of fault on the part of the publisher.¹⁹¹ In addition, in England, the burden of proof regarding the truth of the statement falls on the defamer, whereas in the United States, the defamed must prove the statement was false.¹⁹² These differences are important, since a publication over the Internet is worldwide, which raises questions of which countries' laws will apply and the potential to forum shop for the country with the most favorable law.¹⁹³

184. *Id.*

185. See *supra* notes 146-47 and accompanying text.

186. See *supra* note 148 and accompanying text.

187. See *supra* notes 129-36 and accompanying text.

188. Kaplinsky, *supra* note 96.

189. See *supra* note 148 and accompanying text.

190. See *supra* note 156 and accompanying text.

191. See generally Braithwaite, *supra* note 4, at 1216 (describing the harsh effects of English defamation law); see also *Litigation*, *supra* note 7, at 10 (describing the harshness of English defamation law).

192. See generally *supra* note 58 and accompanying text; *supra* note 131 and accompanying text.

193. See Richards, *supra* note 20, at 613, (discussing choice of law in the United States and England).

IV. JURISDICTION OVER FOREIGN DEFENDANTS

Before a court in either England or the United States can hear a case, it is necessary to determine whether that court has authority over the parties. This section focuses on this jurisdictional issue from the perspectives of English and U.S. law.

A. England's Perspective

1. English Common Law

The English rules governing *in personam* actions¹⁹⁴ are completely procedural.¹⁹⁵ Any plaintiff can invoke, and any defendant can be subject to, England's jurisdiction as long as the defendant is served with a writ of summons.¹⁹⁶ Under English common law, only a person physically present in England could be served with a writ of issuance.¹⁹⁷ The fact that service of a writ is the only common law requirement for subjecting a defendant to the court's jurisdiction shows the courts have not been very concerned with a party's or a dispute's connection to England.¹⁹⁸

One consequence of relying on a purely procedural requirement is that the court may exercise authority under the writ to hear cases that may not be appropriate for trial in England.¹⁹⁹ To protect against an abuse of jurisdiction, a defendant may apply to stay the proceedings because the English court is *forum nonconveniens*.²⁰⁰

A result of the common-law requirement of service of a writ on a defendant physically present in England, was that in situations where the defendant was not present in England, the courts lacked the authority to try a case which would otherwise be appropriate, such as in the case of a tort committed in England.²⁰¹ This anomalous result was remedied by statute, the Common Law Procedure Act

194. See CHESHIRE AND NORTH, PRIVATE INTERNATIONAL LAW 185 (11th ed. 1987) (designating *in personam* actions as those between parties).

195. *Id.*

196. *Id.*; 1 DICEY AND MORRIS, THE CONFLICT OF LAWS 271 (12th ed. 1993) (explaining that if a writ or originating summons cannot be legally served on a defendant, then the court has no authority to exercise jurisdiction over the defendant). Issuance of a writ or originating summons is the process which forms the basis for the English court's jurisdiction over a case. *Id.* at 270-71.

197. See *id.* at 316. A writ of issuance is a phrase used to denote the issuance of a writ or summons upon the defendant. *Id.*

198. See CHESHIRE & NORTH, *supra* note 194, at 185.

199. *Id.*

200. *Id.* This doctrine allows the court to use its discretion to refuse to hear a case if it determines that England is not the appropriate forum. *Id.* See *infra* notes 221-28 for a discussion of the doctrine and the relative factors.

201. CHESHIRE & NORTH, *supra* note 194, at 186.

of 1852, and later incorporated into Order 11 of the Rules of the Supreme Court.²⁰² The statute gives discretionary power to an English court to allow service of a writ on an out of jurisdiction defendant, regardless of the defendant's nationality.²⁰³ Therefore, an English court can obtain jurisdiction where: (1) the defendant is served with a writ in England;²⁰⁴ (2) the defendant consents to jurisdiction by England's court;²⁰⁵ or (3) a statute or statutory order authorizes jurisdiction over a defendant abroad.²⁰⁶

2. Order 11 of the Supreme Court Rules

Order 11 deals with service of process beyond the scope of jurisdiction.²⁰⁷ The introduction to Order 11 lists four categories for service out of jurisdiction. Three relate to cases where leave from the court is not required, while the fourth relates to cases where leave is required.²⁰⁸ Leave of the court is required for cases falling under Order 11, rule 1(1).²⁰⁹ The court may exercise its discretion to grant leave under this rule where: (1) the defendant is not domiciled in a convention country nor has consented to jurisdiction; or (2) the defendant is domiciled in a

202. DICEY & MORRIS, *supra* note 196, at 316; CHESHIRE & NORTH, *supra* note 194, at 186. The Supreme Court Rules are effective in relation to all proceedings in the High Court and the Civil Division of the Court of Appeals. THE SUPREME COURT PRACTICE, *supra* note 63, at O.1, R.2. The High Court is composed of three parts: (1) Queen's (King's) Bench Division, (2) Chancery Division, and (3) Family Division. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 277-78 (16th ed. 1996). The Rules set forth the conduct of civil proceedings in the Supreme Court. THE SUPREME COURT PRACTICE, *supra* note 63, at viii.

203. DICEY & MORRIS, *supra* note 196, at 316; CHESHIRE AND NORTH, *supra* note 194, at 186.

204. CHESHIRE & NORTH, *supra* note 194, at 186.

205. *Id.*

206. DICEY & MORRIS, *supra* note 196, at 270.

207. THE SUPREME COURT PRACTICE, *supra* note 63, at 83; DICEY & MORRIS, *supra* note 196, at 270.

208. THE SUPREME COURT PRACTICE, *supra* note 63, at 83. No leave from the court is required for the following three categories: (1) where jurisdiction is given by the Civil Jurisdiction and Judgement Act 1982 and the defendant is domiciled in Scotland or Northern Ireland; (2) in cases similar to those in category one, but where the defendant is domiciled in Scotland or Northern Ireland; and (3) where statutory authority to exercise jurisdiction on out of state defendants is conferred on the court. *Id.* In 1968, the Brussels Convention was signed by members of European Economic Community (E.E.C.) regarding civil jurisdiction and enforcement of judgments. *Id.* The United Kingdom signed the convention in 1978 with some modifications. *Id.* The Civil Jurisdiction and Judgement Act 1982 is made up of these conventions. *Id.* Order 11, R.1(2)(a) lays out the rule in regard to cases among convention countries. *Id.* at 84-85. The United States is not a convention country. *See id.* at 100 (listing the convention countries). The Act states that a defendant must be sued in the courts of the state where he is domiciled if that state is a convention country, unless specified in Articles 5 through 18 of the Act. *Id.* at 93. The word "domicile" for purposes of the act refers to the defendant's true residence. *Id.* For a detailed coverage of the Act and Conventions, see 52 HALSBURY'S STATUTES 381.

209. Because this comment addresses the United States, and the United States is not a Convention country for purposes of England's jurisdictional rules, this comment only discusses those situations where leave of the court is required. For those situations where leave is not required, see *supra* note 208 (setting forth the three categories for which leave from the Court is not required).

convention country, but the claim at issue is not within the Civil Jurisdiction and Judgment Act of 1982 and the Brussels Conventions.²¹⁰

3. Order 11, Rule 1(1)

It is important to note that Order 11, rule 1 is judicially created under statutory authority.²¹¹ As stated above, Order 11, rule 1(1) governs cases where it is permissible for a judge to authorize service of writ out of the jurisdiction.²¹² Service of writ out of the jurisdiction is permissible with leave from the court provided that the cause of action at issue is among the permitted situations enumerated in Order 11, rule 1(1).²¹³ If service is permissible, then the court has full discretion over whether to grant leave to serve the writ.²¹⁴

The section governing a suit for defamation is Order 11, rule 1 (f).²¹⁵ Order 11, rule 1(f) provides that if the claim is based on a tort, and damage was sustained or resulted from an act committed within the jurisdiction, then service of writ is permissible.²¹⁶ The relevant act for purposes of a defamation cause of action occurs where the defamatory statements are published and not where they are posted or spoken.²¹⁷

210. THE SUPREME COURT PRACTICE, *supra* note 63, at 83. *See supra* note 208 (discussing the Civil Jurisdiction and Judgement Act of 1982 and the Brussels Convention).

211. DICEY & MORRIS, *supra* note 196, at 316.

212. 1 THE SUPREME COURT PRACTICE, *supra* note 63 at 83 ; DICEY & MORRIS, *supra* note 196, at 316; CHESHIRE & NORTH, *supra* note 194, at 186.

213. THE SUPREME COURT PRACTICE, *supra* note 63, at 83-84.

214. *See id.* at 83 (stating that service of writ out of the jurisdiction is permissible with leave of the court); *see also* DICEY & MORRIS, *supra* note 196, at 317 (stating that jurisdiction is discretionary and that a court can decline to allow service or issue of the writ).

215. THE SUPREME COURT PRACTICE, *supra* note 63, at 84; DICEY & MORRIS, *supra* note 196, at 340; *see id.* at 341 (providing that defamation suits are governed by the section covering torts).

216. THE SUPREME COURT PRACTICE, *supra* note 63, at 84; DICEY & MORRIS *supra* note 196, at 340. The provision for torts was previously under order 11, rule 1(h) and only provided for cases where the act was committed in the jurisdiction; this was amended in 1987 to the version stated above. *Id.*

217. DICEY & MORRIS, *supra* note 196, at 341; *Diamond v. Bank of London and Montreal Ltd.*, [1979] Q.B. 333, 1 All E.R. 561 (comparing the tort of negligent misrepresentation in which the tort occurs when the misrepresentation made by telephone or telex is received and acted on, to the tort of defamation where the tort occurs when the statement is published). In both negligent misrepresentation and defamation, damage is needed for the claim to be actionable, but not for the tort to be committed. *Id.* *See Bata v. Bata*, [1948] W.N. 366, 366 (stating that the tort of defamation occurs where the libel statement is published). *Bata* was decided pre 1987, and thus prior to the amendment resulting in the current order 11, rule 1(f). The rule prior to the amendment only provided for cases where the act was committed in the jurisdiction. *See supra* note 216 (discussing rule 1(h)). Applying that rule, the court found that the act of publishing the statement occurred in England. *Bata v. Bata*, [1948] W.N. 366, 366. The actual case involved a Canadian defendant who wrote defamatory letters in Zurich regarding the English plaintiff. *Id.* Three copies of the letter were circulated to members of the British company of which the plaintiff was the chairman. *Id.* In determining where the tort was committed the court stated that the material part of a cause of action for libel is the publication of the statement, not the writing. *Id.* As applied to the case, the tort was the publication to third parties who lived in England, and thus the court held that jurisdiction was proper. *Id.*

The most important guiding principle for the court to follow in granting leave is that the court should be extremely careful when deciding whether to permit service of writ on foreign defendants.²¹⁸ The court must be cautious when exercising its discretion, especially in cases where it may be burdensome on the foreign defendant, in order to avoid offending foreign relations.²¹⁹ In addition, when the dispute has a tenuous connection to England, the plaintiff must show a stronger case.²²⁰

In deciding whether England is the proper place for the suit, the court follows the doctrine of *forum conveniens*.²²¹ The court will make this decision when a plaintiff requests the court to grant leave.²²² The considerations embodied in this doctrine can be found in the case of *Spilada Maritime Corp v. Cansulex Ltd. (Spilada)*.²²³ These same considerations are relied on when the defendant asks the court to exercise its discretion to stay the proceedings on the ground that another

218. *Societe Generale de Paris v. Dreyfus Bros.* [1885] 29 Ch. D. 239, 242-43; DICEY & MORRIS, *supra* note 196, at 316. There are three remaining guidelines for the court, none of which are pertinent to this comment. *Id.* (1) The case must be within Order 11, rule 1 or rule 2. Under this guideline are four principles: (a) The applicant can choose the category under rule 1(1) on which to rely. THE SUPREME COURT PRACTICE, *supra* note 63, at 86; (b) If there is doubt in the construction of any of the Order 11 categories, the ambiguity should be decided in favor of the defendant. *Societe Generale de Paris v. Dreyfus Bros.*, 29 Ch. D. at 242-43; The Hagen [1908] P. 189, 201 (stating ambiguity should be resolved in favor of the foreigner); (c) Since the court uses the plaintiff's application for service out of jurisdiction for determining whether the case falls within Order 11, all relevant facts should be fairly and fully disclosed. *Societe Generale de Paris v. Dreyfus Bros.*, 29 Ch. D. at 242-43; THE SUPREME COURT PRACTICE, *supra* note 63, at 86; DICEY & MORRIS, *supra* note 196, at 316; and (d) The court will not grant leave if it is within the letter but outside the spirit of the rule. *Johnson v. Taylor Bros.*, [1920] A.C. 144, 153; *Beck v. Value Capital Ltd.*, [1975] 1 W.L.R. 6; THE SUPREME COURT PRACTICE, *supra* note 63, at 86. (2) The applicant's burden of proof requires showing that there is a "good arguable case on the merits," meaning that there must be something more than just a *prima facie* case. THE SUPREME COURT PRACTICE, *supra* note 63, at 86; DICEY & MORRIS, *supra* note 196, at 319; *Metall und Rohstoff AG v. Donaldson Lufkin and Jenrette Inc. and Another*, [1990] Q.B. 391. Where questions of fact are involved, the court will look mainly to the plaintiff's case; however the defendant can always REBUT. THE SUPREME COURT PRACTICE, *supra* note 63, at 87. In cases involving questions of law, the court can look at the issues and refuse to grant leave if it determines that the plaintiff is most likely to fail. (4) The Court must be satisfied from the plaintiff's application that it should exercise discretion to grant leave. *Id.*

219. *Id.* at 87.

220. *Id.*; *The Hagen* [1908] P at 191-292.

221. *CHESHIRE & NORTH*, *supra* note 194, at 185; DICEY & MORRIS, *supra* note 195, at 318.

222. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843. For a request that the court grant leave, the burden is on the plaintiff to show that England is clearly the appropriate forum. *Id.*; THE SUPREME COURT PRACTICE, *supra* note 63, at 87. In discharging this burden, the plaintiff is not limited to showing that justice could not be obtained in an alternative forum, and may rely on the nature of the dispute, the legal and practical issues involved, local knowledge, witness availability and his evidence and expense. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843; THE SUPREME COURT PRACTICE, *supra* note 63, at 87.

223. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843. This case involved a contract dispute. *Id.* See *infra* notes 255-58 and accompanying text (applying the *Spilada* case to defamation suits); see also DICEY & MORRIS, *supra* note 196, at 318 (relating that the *Spilada* case contains the considerations that guide the court in a *forum conveniens* determination).

forum is more appropriate.²²⁴ The main principle followed in these determinations is that the court should choose the forum where the case can most suitably be heard for the interests of all the parties and for justice.²²⁵ The court also considers which forum has the most substantial connection to the action in terms of convenience, expense, witness availability, the law governing the transaction at issue, and the parties' places of residence or business.²²⁶ If the court does not find a more appropriate forum, it will usually refuse the defendant's request to stay the proceedings; however, if it determines that another forum is *prima facie* more appropriate, it will grant the stay unless other circumstances dictate otherwise.²²⁷ Although the refusal to grant leave or the granting of a stay of proceedings might deprive the plaintiff of legitimate personal or juridical advantages available in England, this will not generally prevent the court from exercising its discretion in the decided manner if it is convinced that substantial justice would be done to all the parties in the available and appropriate forum.²²⁸

4. *Jurisdiction Cases Involving Torts: Order 11, Rule 1(f)*

Order 11, rule 1(f) outlines when the court may grant leave in a tort case. Present law requires plaintiffs to show their action was founded in tort, and either that the act causing damage was committed in the jurisdiction or that the damage was suffered within the jurisdiction.²²⁹ The Supreme Court guidelines state that tort cases prior to 1987 are unlikely to be helpful precedents and set out some guidelines for the court to follow.²³⁰

224. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843. The only difference between a determination for granting leave and that for a stay of proceedings is the party who bears the burden of the proof, and what that burden entails. *Id.* In a request for a stay of proceedings, a defendant must not only show that England is not the appropriate forum, but in addition, that there is another forum which is clearly more appropriate. *Id.*; THE SUPREME COURT PRACTICE, *supra* note 63, at 87.

225. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843; THE SUPREME COURT PRACTICE, *supra* note 63, at 87.

226. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843; THE SUPREME COURT PRACTICE, *supra* note 63, at 87.

227. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843; THE SUPREME COURT PRACTICE, *supra* note 63, at 87. Circumstances which may dictate against granting a stay when a more appropriate forum exists include the possibility that the plaintiff would not obtain justice in the other forum. *Id.*

228. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843; THE SUPREME COURT PRACTICE, *supra* note 63, at 88.

229. THE SUPREME COURT PRACTICE, *supra* note 63, at ¶(1)(f), at 91; see DICEY & MORRIS, *supra* note 196, at 340 (mentioning that the provision for torts was previously under order 11, rule 1(h) and only provided for cases where the act was committed in the jurisdiction). The section governing torts was amended in 1987 to the version in the accompanying text. *Id.* See *supra* note 68 and accompanying text (explaining that in a cause of action for defamation, the act is publishing, and thus the tort occurs where the statement is published).

230. THE SUPREME COURT PRACTICE, *supra* note 63, ¶(1)(f), at 91. In 1987, the provision for torts was amended from the prior Order 11, rule (1) (h), to the present order 11, rule (1) (f). DICEY & MORRIS, *supra* note 196, at 340. Prior to the amendment, the court could only grant leave where the act was committed in the jurisdiction. *Id.*

In deciding whether a tort was committed in England or another country, the court should look at the events and ask “where in substance the cause of action arises.”²³¹ The court applies English law to this question.²³² Once the court decides that the cause of action was substantially committed in England, it is irrelevant that some of the pertinent events took place elsewhere.²³³ On the other hand, if the court decides the tort was substantially committed in a foreign country, then the court will only grant leave if two conditions are met: (1) the act complained of would be a tort if committed in England, and (2) the tort is also actionable in the foreign country where the act was committed.²³⁴

When determining whether damage was suffered in the jurisdiction, it is enough that some significant damage was sustained in England.²³⁵

5. Defamation Cases Where the Plaintiff Seeks Jurisdiction in England

To see how the English courts will treat a claim based on defamation from Internet communications, it is useful to examine the manner in which the courts have handled traditional defamation suits involving foreign defendants.

In determining whether to exercise jurisdiction over an American company, the court in *Kroch v. Rossell et Cie (Kroch)*²³⁶ focused on the number of copies of a French and Belgian newspaper circulated in England.²³⁷ The court denied leave, emphasizing the plaintiff had no reputation in nor associations with England other than as a temporary resident for purposes of the libel action, the

231. THE SUPREME COURT PRACTICE, *supra* note 63, at 91; *see also* Multinational Gas & Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd., [1983] 2 Ch. 258, [1983] 2 All E.R. 563 (applying this test in a negligence tort case prior to the 1987 amendment where a major issue of the case involved determining where the tort was committed).

232. THE SUPREME COURT PRACTICE, *supra* note 63, at 91; *see supra* note 68 (stating that in a defamation case, English law states that the tort occurs where the statement is published).

233. THE SUPREME COURT PRACTICE, *supra* note 63, at 91. In determining whether the act in question was committed in England, the court should look at the purported tort in a common sense manner and determine whether substantial acts committed within the jurisdiction caused the damage, regardless of whether or not such acts were committed elsewhere as well. *Metall und Rohstoff v. Donaldson Lufkin and Jenrette Inc. and Another* (1989), [1990] Q.B. 391; THE SUPREME COURT PRACTICE, *supra* note 63, at 92.

234. *Chaplin v. Boys*, [1971] App. Cas. 357, [1969] 2 All E.R. 1085; *see also* THE SUPREME COURT PRACTICE, *supra* note 63, at ¶ (1)(f), at 91-92 (emphasizing that if the court decides the tort was in substance committed in a foreign country, then the court should apply the rule laid out in *Chaplin* to determine if it should grant leave).

235. *Id.*

236. *Kroch v. Rossell et Cie*, [1937] 1 All E.R. 725.

237. *Id.* at 728-29; *see also* DICEY & MORRIS, *supra* note 196, at 342 (illustrating the *Kroch* case as an example where the court denied exercising jurisdiction). In the *Kroch* case, the plaintiff sued a publisher for a libelous statement contained in its French and Belgian newspaper of which few copies were sold in England. *Kroch*, 1 All E.R. at 726-27.

papers containing the libel were published in France and Belgium, and the circulation was confined almost completely to those countries.²³⁸

The case of *Bata v. Bata (Bata)* illustrates the meaning of the phrase "an act committed within the jurisdiction" under order 11, rule 1(f).²³⁹ In *Bata v. Bata*, the court granted leave for an English plaintiff against a Canadian defendant.²⁴⁰ Although the defendant wrote the three letters containing the libel in Zurich, the court held jurisdiction was proper since the tort, publishing the letters to third parties, occurred in England where the letters were sent.²⁴¹

In *Birks v. National Enquirer Inc. (Birks)*,²⁴² a case decided under the amended version of Order 11, rule 1 relating to torts, the court considered whether, in a cause of action for defamation, the principles from *Kroch v. Rossell*²⁴³ or those from *Spilada Maritime Corp. v. Cansulex Ltd.*²⁴⁴ should apply.²⁴⁵ In *Birks v. National Enquirer Inc.*,²⁴⁶ the plaintiff was a public relations consultant who had lived and worked in California and New Zealand until near the time of the suit; her only connection to England were frequent visits to her daughter, an English resident, and some friends.²⁴⁷ A major English paper circulated 15,000 copies of a story about the plaintiff being responsible for the destruction of the marriage of a well known person in England.²⁴⁸ The plaintiff sued the paper in July 1991 and received an apology as well as damages.²⁴⁹ The defendant (an American publishing company which circulated about 3.5 million copies of its paper in the United States, including California, as compared to

238. *Id.* at 728-29. The court stressed that even a very small circulation of a foreign language publication could harm a person's reputation among people of England. *Id.* at 729. The problem in the case was the plaintiff had no reputation nor connections with England, nor did he have an occupation. *Id.* at 729.

239. See THE SUPREME COURT PRACTICE, *supra* note 63, at 84 (stating, in Order 11, rule 1(f), that leave may be granted where "the claim is founded on a tort and the damage was sustained, or resulted from an act committed within the jurisdiction"); see also *infra* note 241 (discussing the prior order 11, rule 1(h) as applicable during the *Bata* case, and its requirement that for jurisdiction based on a tort claim, the act had to be committed within the jurisdiction).

240. *Bata v. Bata*, [1948] W.N. 366, 366.

241. *Id.* This case occurred prior to the 1987 amendment to the Supreme Court rule resulting in the current Order 11, rule 1(f). See *supra* note 229 (discussing the prior order 11, rule(h) and the limitation of jurisdiction for torts to those where the act was committed in the jurisdiction). *Bata* illustrates that the 'act' referred to in order 11, rule 1(h), and thus the current order 11 rule 1(f), is the publication of the allegedly defamatory statement to a third party. *Bata v. Bata*, 1948 W.N. 366.

242. *Birks v. National Enquirer Inc.* (C.A. 1991) and available via LEXIS File Engcas.

243. *Kroch v. Rossell et Cie*, [1937] 1 All E.R. 725; see *supra* notes 236-38 (setting forth the principles in the *Kroch* case).

244. *Spilada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 All E.R. 843; see *supra* notes 223-28 (discussing the *Spilada* case). *Spilada* involved a contract dispute. *Id.*

245. *Birks v. National Enquirer Inc.* (C.A. 1991) and available via LEXIS File Engcas.

246. *Id.*

247. *Id.*

248. *Id.* The paper alleged plaintiff was responsible for ruining the marriage of a well-known English citizen and alleged she had an affair with him. *Id.*

249. *Id.*

about 250 copies in England and Wales in 1988) paper carried this report which led the plaintiff to sue it in England.²⁵⁰ The plaintiff claimed that her reputation was damaged there.²⁵¹ The court's discretion in granting leave was challenged by the defendant who contended that the *Kroch* case controlled in a defamation suit, not *Spilada* which was based on a breach of contract.²⁵² The defendant asserted that the small number of circulated copies in England as compared to the United States, along with the U.S. residency of the plaintiff, mandated that the court should not have granted leave.²⁵³ To the defendant's dismay, the court held that *Kroch v. Rossell et Cie* was based on the specific facts of the case, and that a judge must make a case by case decision based on the individual facts.²⁵⁴ The court further held that the question on whether to grant leave is one of fact as to whether the plaintiff has established a cause of action and whether he or she can satisfy the *Spilada* principles.²⁵⁵ The *Spilada* principles require a showing that England is both the appropriate and suitable forum in which the case can be tried for the interests of all the parties and for the ends of justice.²⁵⁶ In granting leave in favor of the plaintiff, the court focused on the existence of a reputation for the plaintiff in England.²⁵⁷ This case illustrates that the *Spilada* principles are applicable to defamation suits.²⁵⁸

To summarize, the English court will decide whether to hear a libel case regarding foreign plaintiffs or defendants by looking at the facts of each case.²⁵⁹ The court will consider a defendant publications's relative circulation in England as compared to elsewhere,²⁶⁰ but ultimately will decide the issue by considering the principles laid out in *Spilada*, including a focus on the plaintiff's reputation in England,²⁶¹ to determine if England is truly the *forum conveniens*.²⁶² The ultimate goal is fairness and justice for all the parties.²⁶³

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. See *supra* note 225 and accompanying text (discussing *Spilada*).

257. *Birks v. National Enquirer Inc.* (C.A. 1991) and available via LEXIS File Engcas.

258. See *id.* (stating that *Spilada* principles apply to defamation suits).

259. See *supra* notes 236-58.

260. See *supra* note 237 and accompanying text.

261. See *supra* notes 257 and accompanying text (discussing *Birks v. National Enquirer*, and the court's focus on the plaintiff's reputation).

262. See *supra* notes 256-58.

263. See *supra* note 225 and accompanying text.

6. *Potential Results of Applying Jurisdiction Law to Internet Defamation Suits*

To illustrate the application of English jurisdiction law to the Internet, the following is an example of a potentially defamatory statement regarding an ornithologist. Assume there are two American professors of ornithology, Professor Jay and Professor Robins. Professor Robins gives lectures on ornithology in England about five weeks a year; he makes a substantial amount of money from this. Professor Jay visits England as well, but infrequently. Professor Jay publishes a Web page entitled "Professor's Real Expertise." The text of the page states that "Professor Robins' only real interest is chasing *Birds*;" the word "*Birds*" appears to be rippling. The log files show a vast minority of people in England have accessed the page; about twice as many people have accessed the page in the United States as well as a substantial amount from various other locations in the world. Professor Robins wants to bring a defamation suit in England against Professor Jay for making a libel statement over the Internet that negatively affected his reputation in England. Will the English court grant leave to issue a writ of summons to bring Professor Jay into England's court system?

The first hurdle is to determine if the Web page is defamatory to Professor Robins. On its face, the statement that "Professor Robins' only real interest is chasing *Birds*" appears quite innocent; after all, ornithology is the study of birds, and the Professor is an ornithologist. However, the term "bird" is a slang term in England referring to a young girl, analogous to the slang term "chick" in the United States. Thus, the statement may be interpreted in England as Professor Robins chases young girls. In determining whether the communication is defamatory or not, the jury will be permitted to consider surrounding circumstances.²⁶⁴ In England, the phrase coupled with the title "Professor Robins' real expertise," could be viewed as derogatory to Robins' reputation. Additionally, the graphics technique of displaying the word "*Bird*" in a rippling manner emphasizes that particular word. Thus, in England, given the choice between an innocent and a defamatory interpretation of the communication, it would most likely be viewed as defamatory.²⁶⁵ In the United States on the other hand, "bird" does not have the same connotation, thus even with the emphasis on the word, most U.S. residents, unless from an English background, would not view the word as disparaging.

264. See *supra* notes 64-65 and accompanying text (providing that in determining whether a statement is defamatory, the reasonable person may consider the surrounding circumstances, such as font and prominence given to the statement).

265. See *supra* note 65 and accompanying text (discussing English & Scottish Co-op Properties Mortgage & Investment Society Ltd. v. Odhams Press Ltd. (1939), [1940] 1 All E.R. at 4-7 (1939)).

Having established that the communication will be considered defamatory in England, the issue arises whether the English courts will grant leave to issue a writ of summons to Professor Jay in the United States.

In *Birks v. National Enquirer*, the English court applied the *Spilada* principles to determine if England was the *forum conveniens*.²⁶⁶ In *Birks*, less than one percent of all the copies of the publication were circulated in England and Wales combined as compared to the amount circulated in the United States.²⁶⁷ In the hypothetical situation, it is difficult to determine the total number of copies circulated since it may not be known with precision how many individuals access the Web page.²⁶⁸ We do know that a substantial minority accessed the page from England, while about twice that amount accessed it from various states in the United States. Furthermore, Professor Robins does have a reputation in England among those who attend his lectures which he gives about five times a year.²⁶⁹ Based on *Birks*, it appears that Professor Jay could find himself subject to England's jurisdiction.

B. The U.S. Perspective

1. The Basic Requirements

In order for a U.S. court to gain jurisdiction over a nonresident defendant, two standard requirements must be satisfied: (1) the forum state's long arm statute²⁷⁰ which permits the state to reach out and pull the defendant in for a cause of action and; (2) the constitutional requirement of due process.²⁷¹ The first requirement is satisfied if the forum state's long arm statute is satisfied.²⁷² The long arm statutes, which vary from state to state, set out the causes of action over which a state court is permitted to exercise jurisdiction.²⁷³ Some state long arm

266. See *supra* notes 245-58 and accompanying text (explaining the case of *Birks v. National Enquirer*).

267. See *supra* notes 245-57 and accompanying text (explaining the case of *Birks v. National Enquirer*).

268. Kaplinsky, *supra* note 96 (providing in most WWW sites, the number of accessors will be determinable, but there are a number of technical reasons why one cannot always determine the exact number of accessors).

269. See *supra* notes 239, 257 and accompanying text (noting the emphasis the English courts place on whether a plaintiff has a reputation in England). A person's reputation can still be harmed by a small circulation in England. *Kroch v. Rossell et Cie*, [1937] 1 All E.R. at 729.

270. See *infra* notes 272-75 (discussing the long arm statute requirement).

271. See *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (explaining that "[t]he Due Process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'")

272. *Lex Computer v. Eslinger*, 676 F. Supp. 399, 402 (1987); *Landmark Bank v. Joseph Manchura*, 736 F. Supp. 375, 379 (1990); *Davila v. Southeast Bank*, 738 F. Supp. 45, 47 (1990).

273. See *Lex Computer v. Eslinger*, 676 F. Supp. at 402 (setting forth the New Hampshire long arm statute which states that "[a]ny person who is not an inhabitant of this state and who, in person or through an agent, transacts any business within this state, commits a tortious act within this state, or has the ownership, use, or possession of any real property situated in this state submits himself, or his personal representative, to

statutes are so limited as to exclude jurisdiction for a cause of action based solely on defamation,²⁷⁴ while others are as broad as to authorize a court to exercise jurisdiction to the full extent of the Due Process clause of the Fifth and Fourteenth amendments.²⁷⁵ The second requirement is met provided that the defendant has sufficient contacts with the forum state, such that asserting jurisdiction comports with "traditional notions of fair play and substantial justice."²⁷⁶ In addition to minimum contacts with the forum state, asserting jurisdiction must be fair and reasonable in light of various considerations.²⁷⁷ With regard to foreign defendants,

the jurisdiction of the courts of this state as to any cause of action arising from or growing out of the acts enumerated above.") (emphasis added). In this case, the defendant sent defamatory letters to clients of the plaintiff. The court held that the long arm statute was satisfied since the *impact* of the defendant's out of state conduct (sending a letter from out of state) resulted in New Hampshire tort, and it was more than fortuitous so that the defendant knew or should have known that his conduct could injure a person in the state. *Id.* at 402-403. See *Far West, Inc. v. Towne*, 46 F.3d 1071, 1074 (1995) (stating the Utah long arm statute which requires that the plaintiff establish defendant conducted certain enumerated activities in Utah, and a nexus between plaintiff's claim and the defendant's conduct). The court specified that phone calls and letters are not necessarily sufficient to establish minimum contacts of the nonresident defendant with the forum state. *Id.* at 1076. See *Landmark Bank v. Joseph Machera*, 736 F. Supp. at 383 (relating the Massachusetts long arm statute which provides that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth; . . . (c) causing tortious injury by an act or omission in this commonwealth; [or] (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth. . ."). The Massachusetts Long Arm Statute, part c, is satisfied "[w]here a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state. . . he has acted within that state." *Id.* at 384.

274. See e.g. Ga. Code Ann. 9-10-91 (1990) (providing that jurisdiction is not permitted for a cause of action for defamation arising out of a tortious act or omission within the State); N.Y. Civ. Prac. L. & R. 302(a) (McKinney 1990) (illustrating that portions of the statute are specifically written to exclude a cause of action for defamation); Minn. Stat. Ann. 543.19(1)(d)(3) (West 1988) (stating that jurisdiction is not permitted for out of state activities causing injury within if the cause of action is in defamation).

275. See e.g. *Caruth v. International Psychoanalytical Association*, 59 F.3d 126, 127 (9th Cir.1995) (relating that the California long arm statute permits jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States.").

276. *International Shoe v. Washington*, 326 U.S. at 316; see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (proclaiming that in analyzing a defendant's minimum contacts a court should consider whether the defendant's conduct and connection with the state are such that he should "reasonably anticipate being haled into court there"); see also *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (stating that due process requires that persons have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign"); cf. *Hanson v. Deckla*, 357 U.S. 235, 253 (1958) (proclaiming that it is necessary for the defendant to avail himself of the privilege acting within the forum state); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) (confirming that "fair warning" is satisfied if the defendant "purposefully directed" his activities at residents of the forum state); *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 112 (1987) (announcing that to comply with the requirements of due process, the defendant must purposefully direct his actions towards the forum state).

277. See *infra* notes 292 and accompanying text (setting forth the factors considered in determining whether exercise of jurisdiction comports with the notions of fair play and substantial justice).

the reasonableness of extending personal jurisdiction across national borders demands much attention as well.²⁷⁸

Personal jurisdiction can be broken down into two types, general and specific.²⁷⁹ The requisite contacts needed to satisfy the due process prong of a personal jurisdiction analysis depend on whether specific or general jurisdiction is sought.²⁸⁰ With general personal jurisdiction, one would look to see if the defendant has purposeful and systematic contacts with the forum state in order to justify jurisdiction.²⁸¹ Specific jurisdiction, on the other hand, looks at the relationship between the contacts leading to personal jurisdiction and the activities underlying the cause of action.²⁸² Thus, with specific jurisdiction, the requisite level of minimum contacts may only include one contact with the forum, provided the cause of action arises out of that contact.²⁸³ Specific jurisdiction is usually the type of personal jurisdiction involved in defamation suits.²⁸⁴

278. See *infra* notes 298-301 and accompanying text (setting forth the unique burdens involved when dealing with a foreign defendant).

279. See *Landmark Bank v. Joseph Marchero*, 736 F. Supp. 375, 379 (1990) (distinguishing between specific and general personal jurisdiction); see also *International Shoe v. Washington*, 326 U.S. at 317 (explaining that the defendant's contacts within the forum are not as significant when the cause of action arises from the defendant's contacts in the forum as when the cause of action is related to those contacts).

280. See *Landmark Bank*, 736 F. Supp. at 384 (asserting that the level of necessary contacts to satisfy the fairness requirement of the due process prong is in part dependent on whether specific or general jurisdiction is being sought).

281. See *Landmark Bank*, 736 F. Supp. at 379 (describing the necessary contacts in order for a court to exercise jurisdiction based on general personal jurisdiction).

282. See *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985) (explaining that where a forum seeks specific jurisdiction over a non-consenting, foreign defendant, the "fair warning" requirement announced in *Shaffer v. Heitner* is met if the defendant "purposefully directed" his activities at residents of the forum state, and the cause of action results from purported injuries arising out of or relating to those activities); *The Landmark Bank v. Joseph Marchero*, 736 F. Supp. at 379 (noting the necessary contacts for jurisdiction based on specific personal jurisdiction). The level of contacts to constitute "fair warning" depends on the cause of action and whether general or specific jurisdiction is sought. *Id.*; *Lex Computer v. Eslinger*, 676 F. Supp. at 403 (relating that the requisite minimum contacts to satisfy the due process clause of the 5th and 14th amendments are established when the defendant purposefully directs activities to residents of the forum state, and litigation results from purported injuries arising out of or relating to those activities); *Caruth v. International Psychoanalytical Association*, 59 F. 3d 126 (9th Cir. 1995) (maintaining that specific jurisdiction is appropriate when a nonresident defendant purposefully directs activities toward the forum or a resident thereof; the claim arises out of or relates to the defendant's forum-related activities; and exercise of jurisdiction is reasonable to constitute fair play and substantial justice).

283. See *id.* at 379 (stating that one contact may be sufficient for jurisdiction based on specific personal jurisdiction). This is especially true with torts. *Id.* *International Shoe v. Washington*, 326 U.S. at 317 (providing that less contacts are required within the forum if the cause of action is based upon those contacts); *Landmark Bank v. Joseph Marchero*, 736 F. Supp. at 385 (emphasizing that Massachusetts courts have held a single act within the forum constitutes sufficient contacts to justify assertion of jurisdiction). One of these cases held that a single telex sent from a British defendant to a Massachusetts plaintiff was enough to support jurisdiction. *Id.* at 385.

284. See *Landmark Bank v. Joseph Machera*, 736 F. Supp. at 379 (specifying that specific jurisdiction is usually more appropriate for allegations of tortious conduct).

In addition to the traditional personal jurisdiction cases, a line of cases has developed dealing strictly with libel and defamation.²⁸⁵ These cases read traditional cases broadly, sometimes yielding surprising results.²⁸⁶ If applied to the Internet, the results could be shocking.²⁸⁷

2. *The Cases that Established the Modern Personal Jurisdiction Law*

The United States, taking its lead from early English case law, followed the territorial principle²⁸⁸ in the famous jurisdictional case of *Pennoyer v. Neff*.²⁸⁹ During the first half of the twentieth century, the territorial requirement was rejected and replaced with the requirement that a state must have sufficient contacts with the defendant to an extent that maintenance of a suit locally would not offend "traditional notions of fair play and substantial justice."²⁹⁰ The case of *World-Wide Volkswagen Corp. v. Woodson* (*World-Wide*) defined "substantial justice."²⁹¹ *World-Wide* stated several factors to be considered, in addition to the establishment of minimum contacts, in determining whether asserting personal jurisdiction would constitute "fair play and substantial justice": (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in getting efficient relief; (4) efficient resolution of the controversy and; (5) the social policy interests of possible jurisdictions.²⁹² *World-Wide* also asserted that the unilateral activity of one claiming a relationship with a nonresident defendant does not qualify as a sufficient contact with the forum state for minimum contact purposes.²⁹³ The court further explained that due process would not be violated if a corporate defendant entered products into the stream

285. See *infra* notes 304-19 and accompanying text (describing the *Calder* case and its progeny).

286. See *infra* note 317 and accompanying text (relating the application of the *Calder* case to various other libel cases).

287. See *infra* notes 342-43 and accompanying text (examining the results from application of a broad interpretation of the *Calder* case).

288. J. Starke, *Introduction to International Law*, in BARRY E. CARTER AND PHILIP R. TRIMBLE'S *INTERNATIONAL LAW* 728, 728 (2 ed. 1995) (mentioning that historically, England followed the territorial principle of jurisdiction, which allows a country to exercise jurisdiction over property and persons that occur within its territory).

289. 95 U.S. 714 (1877); Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, (1983).

290. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

291. 444 U.S. at 286. *World-Wide* involved a products liability action whereby a New York corporation, having no contacts with Oklahoma, was sued in that State due to an accident there resulting from a car sale to New York residents in New York. *Id.* The court held that it was not enough that it was "foreseeable" that the car would cause injury in Oklahoma due to its mobile nature; rather, it would be necessary for the defendant to "purposefully avail" itself of the privilege of conducting activities in Oklahoma. *Id.* at 295-97.

292. *Id.* at 286, 292.

293. *Id.* at 297. The assertion regarding a unilateral activity was made because the court stated that the car finding its way to Oklahoma was completely the unilateral activity of the purchaser. *Id.*

of commerce with the anticipation they would be bought by consumers in the forum state.²⁹⁴

The case of *Burger King v. Rudzewicz* (*Burger King*) reinforces the notion that if a person or corporation purposefully directs its activities toward the forum state, then they can reasonably anticipate being haled into that state's court.²⁹⁵ In addition, it makes no difference that the defendant never physically entered the forum state in order to satisfy the minimum contacts requirement;²⁹⁶ "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence."²⁹⁷

Asahi Metal Indus. Co. v. Superior Court of California (Asahi), a case involving a Japanese corporation as a defendant, focused on the reasonableness of asserting personal jurisdiction over a foreign defendant in U.S. courts.²⁹⁸ The court examined the *World-Wide* factors and determined that even though the goods were placed into the stream of commerce, asserting personal jurisdiction over these foreign defendants would be unreasonable.²⁹⁹ In addressing the *World-Wide* factors, the court stated the unique burdens involved when dealing with an alien, such as the burden of traveling to another country to have a case submitted to a foreign judicial system, should be given significant weight when determining the reasonableness of asserting personal jurisdiction over national borders.³⁰⁰ Moreover, substantive and procedural policies of other nations and the U.S. Government's policy interests in foreign relations will best be respected by serious consideration of the reasonableness of extending jurisdiction internationally.³⁰¹ The ease of publishing statements worldwide over the Internet, renders these last two factors of major importance.³⁰²

294. *Id.* at 298.

295. *Burger King Corporation v. Rudzewicz*, 471 U.S. at 475; *cf. Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988) (recognizing that the analysis for "purposeful availment" examines whether a defendant's contacts with the forum state are a result of her own actions or solely attributable to actions by the plaintiff). The Ninth Circuit goes on to announce that its decisions have modified the purposeful availment analysis to permit "the exercise of jurisdiction over a defendant whose only 'contact' with the forum is the 'purposeful direction' of a foreign act having effect in the forum state." *Id.* (quoting *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986)).

296. *Burger King Corporation v. Rudzewicz*, 471 U.S. at 476.

297. *Id.* at 476.

298. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. at 112.

299. *Id.* at 113.

300. *Id.* at 113.

301. *Id.* at 115.

302. *See supra* Parts I-II (discussing the ability of almost anyone to publish using the Internet).

3. Expansive Readings in the Defamation Arena

A line of cases dealing with libel and defamation has developed over recent years giving a broad interpretation to the traditional cases.³⁰³ The cases have focused on the place where the effects of the harm from defamation were felt;³⁰⁴ even where the statement was not aimed at a particular locale, some of these cases have stated that when one publishes a false statement about another, that person can infer the bulk of the harm will be felt where the defamed resides. Therefore, the defamer can reasonably anticipate being called to answer for the act in the forum of the plaintiff.³⁰⁵ This has been the case even where the plaintiff had almost no reputation prior to the statement.³⁰⁶

In *Calder v. Jones* (*Calder*),³⁰⁷ a California plaintiff sued Florida defendants, an editor and a reporter of the *National Enquirer*.³⁰⁸ The U.S. Supreme Court held that jurisdiction was proper because the alleged harm was "intentionally directed at a California resident."³⁰⁹ The Court stated it was irrelevant that the activities causing the harm were outside the State since the cause of action arose out of

303. See *infra* note 313-18 and accompanying text (discussing the cases following *Calder v. Jones* 465 U.S. 783 (1984)).

304. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (establishing that the fact that the act causing effects in state were committed out of state does not prevent the State from asserting jurisdiction over a suit arising out of those effects). The *Calder* Court referred to the case of *World-Wide* for support of the doctrine that if defendants purposefully direct their activities to the forum state, they are liable for actions arising out of the effects of their activities felt in the forum state. *Id.* The Court rejected defendants' distinction from *World-Wide* on the basis that the defendants in this case had no economic stake in sales to another state. *Id.* Rather, the Court stressed that jurisdiction was still proper because the intentional and tortious nature of their acts were directed towards the state. *Id.* Note that later courts focused on the direction of the activities towards the resident. See *infra* note 317.

305. See *supra* note 317 (setting forth this proposition); cf. *Buckley v. McGraw-Hill, Inc.*, 762 F. Supp. 430, 437-39 (D.N.H. 1991) (taking this proposition one step further). This district court confirmed *Calder v. Jones*, 465 U.S. 783 (1984) as holding that when defendants direct their actions at a resident of the forum State, it can be reasonably inferred that they intended the harm to be felt in the state where the resident had an established reputation. *Id.* The court went further in recognizing that although none of the parties to the suit have any real connection to the forum state, it does not mean that the plaintiff did not suffer injury to his reputation in the forum state. *Id.* The court went on to state that the fact that the "'brunt of injury' in *Hugel* and *Calder* occurred in the forum state. . . were factors coincidental to the plaintiff's residence in the forum state." *Id.* Elaborating, the court emphasized that the defendant's allegedly tortious act was aimed specifically at the plaintiff, and that with defamation the conduct, i.e. the publication, occurs wherever the libel was distributed. *Id.* The court concluded by holding that all the defendants who had a direct part in writing and publishing the defamatory matter must reasonably anticipate being called into court in an action for libel wherever injury to the targeted plaintiff can be expected to occur. *Id.*

306. See *Keeton v. Hustler Magazine*, 465 U.S. at 777 (explaining that the libel may create a negative reputation in a jurisdiction where the plaintiff's prior reputation was, "however small, at least unblemished").

307. *Calder v. Jones*, 465 U.S. 783 (1984).

308. See generally *Calder v. Jones*, 465 U.S. 783 (setting forth the involved parties).

309. *Calder v. Jones*, 465 U.S. at 790. The Court alluded to this being a case covered by specific jurisdiction when it noted that lack of contacts will not defeat jurisdiction that is otherwise proper. *Id.* at 788. It further added that the plaintiff was the focus of the defendant's activities (not the state) out of which the suit arose. *Id.*

those effects felt in the forum state.³¹⁰ The Court emphasized that it was not relying on the defendant's visits or phone calls to the State, since the California courts have approved the "effects" test.³¹¹ Expansive readings of this case have arisen due to the unclear meaning of "intentionally directed at a California resident."³¹²

One of the first cases to interpret *Calder* expansively was *Hugel v. McNell*.³¹³ This case involved libelous statements about a New Hampshire resident provided by a resident of another state to the Washington Post, which disseminated it all over the country.³¹⁴ The court applied *Calder* as the authority for determining personal jurisdiction in defamation suits.³¹⁵ The court emphasized that the defendant's actions were aimed toward a New Hampshire resident; that he knew it would have a devastating effect on the plaintiff; and thus it can be *fairly inferred* that he intended the brunt of the injury to be felt in New Hampshire where the plaintiff had established a reputation.³¹⁶

Several federal district, as well as federal circuit courts, have likewise subscribed to a broad interpretation of the *Calder* case.³¹⁷ However, several federal

310. See *id.* at 789 (announcing that jurisdiction is proper based on the effects of Florida conduct in California, i.e. harm to the plaintiff's reputation). The Court emphasized that they were not relying on the defendant's visits or phone calls to California, since the California Courts have approved of the "effects" test. *Id.* at 787.

311. *Id.* at 787.

312. See *infra* notes 316-17 and accompanying text (illustrating applications of the phrase to other cases).

313. *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989).

314. See *id.* at 2 (setting forth the facts of the case).

315. See *id.* at 5 (adopting *Calder* as the precedent for the "intentional" tort of defamation). The court stated that the intentional actions of making defamatory statements to a third party, were aimed at the forum; the defendant knew it was likely to have a terrible effect on the plaintiff; and he knew that the brunt of the injury would be felt by the plaintiff in his state of residence. *Id.* The court emphasized in *Calder* that *knowledge* that the major impact of the injury would be felt in the forum state constitutes purposeful availment or a substantial contact for personal jurisdiction purposes. *Id.*

316. See *id.* at 4 (citing the traditional cases of *World-Wide Volkswagen*, *Burger King*, *Asahi*, and *Calder* as support for the court's conclusion that directing actions towards a New Hampshire resident, with knowledge that it will have a devastating effect, leads to inference that he intended the injury to be felt in New Hampshire, where the plaintiff had established a reputation). *Id.* Note that in the court's application of *Calder* to the facts of the case at bar, the court specified that by targeting his actions at the plaintiff, it could be inferred that the defendant intended to harm the plaintiff where he resided and had a reputation. *Id.* The court seems to be emphasizing that it is the direction of the harm to the plaintiff, rather than to the forum that is significant; New Hampshire is the proper place for the suit by virtue of its resident, the plaintiff. *Id.* at 4-6. Note that in regard to suing the defendant in a forum where the plaintiff has an established reputation, some cases have emphasized that a libel victim's reputation may suffer harm in a place, where, up to the events giving rise to the case, he was anonymous. See e.g., *Keeton v. Hustler*, 465 U.S. at, 777 (proclaiming that the libel may create a negative reputation in a jurisdiction where the plaintiff's prior reputation was, "however small, at least unblemished"). The Court further emphasized the state's interest in protecting its citizens from the deception that results from exposure to false statements of fact. *Id.* at 776.

317. See *Lex Computer & Management Corp. v. Eslinger & Pelton, P.C., CBS, Inc.*, 676 F.Supp. 399, 404 (1987) (stating that minimum contacts are established when defendants purposefully direct their activities to residents of the forum State). The court explained that by sending defamatory letters to customers of a New Hampshire corporation, the defendants purposefully directed their activities to the New Hampshire corporation,

courts maintain that *Calder* is not to be interpreted as an exception to the rule that defendants must purposefully avail themselves of opportunities in the forum State, stressing that absent some purposeful availment or direction to the forum state, the due process prong of the personal jurisdiction analysis will not be

and thus there are sufficient minimum contacts to establish jurisdiction based on the "effects" of their conduct. *Id.* at 404. The court recognized *Calder* as a case where the California Court could bring in a Florida defendant that had no independent contacts with the forum state. *Id.* at 404. Applying the logic of *Calder*, the court explained that if the defendant sent defamatory letters to plaintiff's customers, it should have anticipated the harm to plaintiff's business; to the extent that the letters harmed plaintiff's business and the damage occurred in New Hampshire, the defendant had fair warning. *Id.* at 405. See *Caruth v. International Psychoanalytical Ass'n*, 59 F.3d at 127 (setting forth the three part test used by the Ninth Circuit to show when specific jurisdiction is appropriate: "(1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof...; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must...be reasonable."). When the cause of action is based in tort, the purposeful availment prong is analyzed under the "effects" test. *Id.* at 128. The case, involving a claim of denial of status based on age discrimination, found the requirements for purposeful availment were met: the defendant's decision was directed at a California resident, the defendant knew that any harm suffered would be by the plaintiff in the state in which she resides. *Id.* The third part of the test, i.e. reasonableness, is presumed when purposeful availment is established, with the burden on the defendant to rebut the presumption. *Id.* The defendant failed to establish that jurisdiction would be unreasonable. *Id.* at 129. See *Far West Capital Inc. v. Towne*, 46 F.3d at 1077 (citing *Burt v. Board of Regents*, 757 F.2d 242, 244-45 for the proposition that "no due process notions of fairness are violated by requiring one who intentionally libels another to answer for the truth of his statements in any state where the libel causes harm to the victim."). The Tenth Circuit distinguished use of the 'effects' test for business torts where courts often emphasize a defendant's contacts with the forum state that are independent from those established by way of the intentional tort. *Id.* at 1078. See also *Sinatra v. National Enquirer, Inc.*, 854 F.2d at 1195, (citing *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986) for the proposition that decisions of the Ninth Circuit have interpreted *Calder* and *Burger King* as modifying the analysis for purposeful availment to permit "the exercise of jurisdiction over a defendant whose only 'contact' with the forum is the 'purposeful direction' of a foreign act having effect in the forum state."); *Laykin v. McFall*, 830 S.W.2d 266, 276 (Tex. 1992) (Bryan Poff, Jr., dissenting) (interpreting *Calder* as permitting jurisdiction since the defendants knew the article would injure the plaintiff and that the injury would be felt most where she lived and worked). The dissent, citing *Calder* for support, notes that the Supreme Court has made clear that when a defendant intentionally inflicts injury in the forum state, it is unnecessary to consider the defendant's other contacts with the forum. *Id.* at 276. See also *Coblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F.Supp. 1364, 1369 (M.D. Ala. 1989) ("[W]hen the origin of a deliberate, nonfortuitous tort is in one state...and the intended injury to a recognized victim is in another state, the tortfeasor has affirmatively established minimum contacts with the state in which the injury occurred. . ."); *Carteret Sav. Bank v. Shushan*, 954 F.2d 141, 148 (3rd Cir. 1992) (affirming that with the effects test, a court may exercise jurisdiction over a defendant whose acts outside the forum cause an effect upon the plaintiff in the forum state); *Pilot Air Freight Corp. v. Berkshire Hathaway, Inc.*, No. CIV.A.91-4680, 1992 U.S. Dist. LEXIS 9307, at *11 (E.D. Pa. July 2, 1992) (finding jurisdiction proper since defendant knew the defamatory article would effect the resident plaintiff); *Shaw v. North Am. Title Co.*, 876 P.2d 1291, 1300 (Haw. 1994) (holding that allegations of intentional torts satisfy due process).

satisfied.³¹⁸ The manner in which a court interprets *Calder* will determine the outcome of defamation suits arising from Internet communications.³¹⁹

4. Personal Jurisdiction for Defamation via the Internet

a. Minimum Contacts

Provided jurisdiction is not being sought in a state such as New York or Georgia, satisfaction of a state's long arm statute should not be an issue.³²⁰ Thus, the constitutional requirement of minimum contacts is the most integral part of the analysis.

Where a court seeks specific jurisdiction over a non-consenting, foreign defendant, it is deemed that the defendant had "fair warning" if the defendant "purposefully directed" his activities at residents of the forum state, and the cause of action results from purported injuries arising out of or relating to those activities.³²¹ Since specific jurisdiction is usually sought in defamation suits, it is necessary to determine what constitutes "purposeful direction" or "purposeful availment" by a defendant in the Internet community.³²²

Again, the Internet contains no geographic boundaries.³²³ When a message is posted on a newsgroup, transmitted via e-mail or published as or on a Web page, it is not accomplished from a geographic location.³²⁴ Though a Web page exists on a hard drive of a computer in a physical location, it can be retrieved and viewed throughout the world and thus cannot be considered "located" only in a particular state.³²⁵ Furthermore, just because the computer on which the Web page is housed sits in a particular location does not mean that the author is necessarily in that location or even knows the geographic location of the computer housing the page.³²⁶ For example, a page may be authored in California, while the

318. See *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985) (rejecting interpretation of *Calder* as creating an exception to rule that defendants must purposefully avail themselves of opportunities in the forum state); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988) (maintaining that purposeful direction is necessary and rejecting the broad interpretation of *Calder*); *Green v. USF&G Corp.*, 772 F.Supp 1258, 1262 (S.D. Fla. 1991) ("[I]t would seem to vitiate the two part approach to jurisdiction to hold that in every case where a tort has occurred in the state, the exercise of jurisdiction comports with due process.")

319. See *infra* Part IV(A)(4)(a) (applying *Calder* to the Internet).

320. See *supra* note 274 and accompanying text (providing that the Long Arm statutes for New York and Georgia do not permit jurisdiction for a cause of action based solely on defamation).

321. See *supra* notes 282-84 (explaining that specific, rather than general, jurisdiction is proper in defamation cases, and providing the basis for specific jurisdiction).

322. See *supra* note 282 and accompanying text (setting forth that when the court seeks specific jurisdiction, a defendant has fair warning if he purposefully directed his activities at forum residents, out of which arose injuries giving rise to a cause of action).

323. See *supra* Parts 1-11 (examining the Internet).

324. *Id.*

325. Kaplinsky, *supra* note 94.

326. *Id.*

computer which houses the file is located in New Jersey.³²⁷ Likewise, when a message is posted to a newsgroup or sent as an e-mail, the author need not be in the same location as the machine housing the file, and the author may again not know where the newsgroup or the recipient of the e-mail is located.³²⁸ The corollary is that the user receiving the information or accessing the WWW page need not and often times cannot know the physical location of that file or its author.³²⁹

It is generally recognized that a letter mailed to a geographic location or a phone call into a state constitutes purposeful direction since the nature of postal address infers knowledge of the recipient's residence as does an area code in a long distance phone call.³³⁰ Following that logic, it is arguable that since an e-mail message does not require a geographic address to reach its recipient,³³¹ a sender unaware of the physical location of the recipient could not purposefully direct activities into the forum state. For example, it is not evident from the Internet address of Joe@doe.com that Joe resides in Wisconsin. The same is true of a newsgroup. A user making a statement on a newsgroup has no idea as to the geographic location of the computer housing the newsgroup.³³² However, is it really fair to apply standards used in the physical world for determining purposeful availment to a medium with no geographic boundaries? Should knowledge of a physical locale or area code of a recipient be the determining factor? After all, a sender purposefully sends e-mail or posts to a newsgroup.³³³ Furthermore, Usenet and many e-mail providers warn users prior to posting that their message will be posted to thousands of computer systems worldwide, which shows that these users anticipate their message will be directed to locations worldwide.³³⁴

In *Burger King v. Rudzewicz*, the court observed that it is an unavoidable fact of modern life that a considerable amount of business is transacted completely by mail and wire communication across state lines.³³⁵ What is inescapable in today's

327. *Id.*

328. *Id.*

329. *Id.*

330. See *supra* note 317 (discussing *Lex Computer & Management Corp. v. Eslinger & Pelton, P.C.*, 676 F.Supp. 399, 404 (D.N.H. 1987)); *Dion v. Kiev*, 566 F.Supp. 1387, 1390 (E.D. Pa. 1983) (exercising jurisdiction over a nonresident defendant on the basis of a single telephone call into the forum state).

331. See *supra* note 38 and accompanying text (describing e-mail and noting that users have electronic, rather than geographic, addresses).

332. Kaplinsky, *supra* note 94.

333. Users posting to a newsgroup or sending an e-mail message, go through the act of typing their message, and actively decide to send their message.

334. See *USENET Posting Tips*, *supra* note 47. Netcruiser is software owned by Netcom, one of the largest U.S. providers of Internet conductivity. Kaplinsky, *supra* note 94. Following the warning that communications will be posted to computers all over the world, the sender is provided a choice, designated "yes" if they want to complete the communication and "no" to cancel. See *USENET Posting Tips*, *supra* note 47. Other software provide similar warnings. Kaplinsky, *supra* note 94.

335. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

modern world is that mass communications among individuals as well as business transactions are regularly conducted through the Internet, especially e-mail. The only difference between communications of the past and those of the electronic present is the latter transaction lacks a physical piece of paper marked with a geographic location. The activity is the same; a person still writes a message to a single or countless individuals, and that person still makes a conscious decision to send the message by the physical act of pressing a button. The distinction lies in directing the message to an Internet, rather than a geographic, address.

It may be viewed that "purposeful direction" toward a forum is lacking when a user downloads a Web page or logs on to a newsgroup since the communication is reached by the unilateral activity of the recipient.³³⁶ However, this ignores the knowledge and acts of the publisher. A publisher posts a message to a newsgroup or publishes a Web page with the expectation that it will be read by countless individuals; it is far from merely fortuitous that a user will come across the communication.³³⁷ Though an author may have the desire that only users in a particular location view the message, the expectation is users will ignore this desire.³³⁸ For example, just because a particular Web page states that only users in California should continue to view that page, the author does not have a realistic expectation that recipients other than Californians will not view the page.³³⁹

Someone publishing on the Internet does so with the knowledge that it is a publication to the world. Thus he is purposefully directing his activities to a worldwide audience when he communicates on the Internet.³⁴⁰ Arguing there is no purposeful direction since the publication is not directed at a particular geographic location focuses on the form rather than the substance of the act. Furthermore, it is oxymoronic to compare publishing in the Internet community to publishing in the geographic world when the Internet is not comprised of geographic boundaries.³⁴¹

336. See *supra* notes 293 and accompanying text (discussing *World-Wide*). In *World-Wide*, the Court noted that the car making its way to Oklahoma was the unilateral activity of the purchaser, and thus does not establish minimum contacts between the defendant and the forum State. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). Likewise, it is arguable that a user engages in a unilateral activity when receiving communications from the Internet.

337. See *supra* note 334 (discussing the warning displayed prior to posting to USENET or sending an e-mail message).

338. See *supra* note 334 (providing that communicators are forewarned that their statements will be transmitted worldwide). It follows that communicators cannot expect only users in certain locations to receive to their statements. *Kaplinsky*, *supra* note 94.

339. Since technology does not bar a non-Californian from viewing the page, the creator of the page has to rely on other users' self censorship. This is not a realistic expectation.

340. See *supra* note 47, 334 and accompanying text (discussing the warning displayed prior to posting to USENET or sending an e-mail message).

341. See *e.g. Surf Rider*, CAL. L. BUS., July 8, 1996 at 12 (recognizing the Internet knows no geographic boundaries).

If courts follow the "effects test" as set forth in the cases expanding on *Calder*, persons making defamatory statements on the Internet, could find themselves subject to the jurisdiction of any state in the United States in which they know the communication can be accessed, including the plaintiff's resident state. Since users know their statements can be accessed worldwide, one can infer they know their communication can be accessed in every state and country connected to the Internet.³⁴² For instance, if Joe sends out communication defaming Robert Smith, according to some jurisdictions, Joe knows that any harm suffered by Robert will be in his resident state, thus Joe had fair warning he could be subject to that state's jurisdiction.³⁴³

Publishing statements on the Internet by newsgroup or WWW is analogous to injecting a product into the stream of commerce.³⁴⁴ *World-Wide Volkswagen* states if the sale of a manufacturer's product arises from its efforts to directly or indirectly serve the market in other states, it is reasonable to subject it to jurisdiction in a state where injury results from its product.³⁴⁵ The same can be said for communications on the Internet. Authors do not provide their communications to only those who request them. Therefore, it is not merely foreseeable their communications will be published worldwide.³⁴⁶ Rather, authors send their communications to the world; the communications do not merely sit idle in the author's home state awaiting the unilateral activity of an audience.³⁴⁷ When users post to a newsgroup, they are fully aware of this since a message to the extent of "are you sure you want to post your message to thousands of computer systems around the world?" is offered.³⁴⁸ Authors have a choice at this point to directly inject their communication into the global stream of communications.³⁴⁹ Just as a state acts within constitutional limits when it asserts personal jurisdiction over a corporation "that delivers its products into the stream of commerce with the expectation that

342. See *supra* note 47, 344 and accompanying text (discussing the warning displayed prior to posting to USENET or sending an e-mail message). As of 1994, 146 countries were connected to the Internet. Rosalind Resnick, *supra* note 25, at A1.

343. See *supra* notes 316-17 and accompanying text (discussing cases subscribing to this view).

344. See Colin Stretch, *Internet Technology & Personal Jurisdiction*, (visited Sept. 29, 1996) <<http://roscoe.law.harvard.edu/courses/tec...course/sessions/jurisdiction/stretch.html>> (recognizing that the "stream of commerce" theory is vitally important in determining whether Internet communications subjects users to liability in every state).

345. *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 297 (1980).

346. See *id.* at 298 (providing foreseeability of a product ending up outside the selling area of dealer is not sufficient for due process).

347. See *supra* note 326 and accompanying text (explaining that the computer hosting an author's communication may not even be located in his geographic state); see also *ACLU v. Reno*, 929 F.Supp. 824, 878 (E.D. Pa. 1996) (contrasting the Internet from other media, since there is not technological way to limit the geographic scope of one's communications on the Internet).

348. See *supra* note 47, 344 and accompanying text (discussing the warning displayed prior to posting to USENET or sending an e-mail message).

349. See *ACLU v. Reno*, 929 F.Supp. at 844 (providing once a communication is put on the Internet, the publisher cannot prevent it from entering any community).

they will be purchased by consumers in the forum State,"³⁵⁰ it follows that a state would not exceed its powers under the constitution by asserting jurisdiction over publishers delivering their communications into the stream of global communications when they know that thousands of computer systems around the world will receive the message.

b. Reasonableness—the Safety Net?

The reasonableness factors set out in *World-Wide* could very likely prevent a court from exercising jurisdiction over a foreign defendant as illustrated in *Asahi*.³⁵¹ *Asahi* stressed the unique burdens involved when dealing with a foreign defendant such as the burden of traveling internationally and being tried in a foreign judicial system.³⁵² This will be an important consideration when determining whether to subject a foreigner to personal jurisdiction in the United States for his defamatory statements published on the Internet.

5. Hypothetical Situations Involving the Internet

Refer back to the example regarding Professor Robins and Professor Jay.³⁵³ Assume the statement is "Professor Robins' only real interest is chasing chicks." Assume Professor Jay resides in England and Professor Robins resides in California where he would like to bring suit. About 150 people accessed the Web page from the United States, as compared to 400 combined in other countries. While it is possible to determine the particular states from where the accesses came, it is difficult.³⁵⁴ Assume that 120 of the locations were ascertainable and that seven people in California accessed the Web page. Professor Robins has never been to California and has no business ties there. Will the California courts assert jurisdiction over Professor Robins? Under a traditional minimum contacts analysis the court will look to whether Professor Jay purposefully directed his communications to California.³⁵⁵ If the court views access to the page as the unilateral activity of those who downloaded the page, and thus as lacking purposeful direction into the forum, then the court most likely would not assert per-

350. *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 298 (1980).

351. See *supra* notes 299-301 and accompanying text (illustrating the *Asahi* court's application of the *World-Wide* factors).

352. See *supra* note 300 and accompanying text.

353. See *supra* Part IV(A)(6) (setting forth this hypothetical).

354. The person that monitors the computer hosting the page can go into the logue, and see which computers accessed the page. Kaplinsky, *supra* note 27. The monitor would have to trace it back. *Id.* For instance, a person could see that someone from AOL accessed, but not where that computer was located. *Id.* Someone from AOL could presumably determine the locations of the computers which accessed the page. *Id.*

355. See *supra* Part IV(B)(2) (discussing requirements for a traditional minimum contacts analysis).

sonal jurisdiction over Professor Jay.³⁵⁶ On the other hand if the court recognizes Professor Jay knew at the time he published the WWW page that it would be sent to thousands of computer systems all over the world where people could view it, then the argument is Professor Jay expected some of these systems to be located in California. Thus, his page was not merely sitting on his personal computer in England, nor necessarily being hosted on a computer located in England. Rather, he purposefully directed his WWW page to the world at large, where it is unreasonable to expect that someone in California would not receive the publication. If purposeful direction is established, and since the communication was the source of harm to Professor Robins, minimum contacts may well be established.³⁵⁷ However, since Professor Jay is from another country, the reasonableness of bringing him into a foreign country to defend himself in a foreign judicial system, may prompt the court to deny personal jurisdiction over him.³⁵⁸

If the court follows the "effects test", as California does, then Professor Robins would most surely satisfy the constitutional requirement of minimum contacts.³⁵⁹ Since Professor Robins was the intended victim of the libelous WWW page, the defendant knew that any harm the plaintiff suffered would be in the state in which he resides, providing fair warning that he could be brought into the California courts.³⁶⁰ The states following the effects test as the analysis for purposeful availment provide that reasonableness is presumed when this is established, thus leaving the burden on the defendant to rebut the presumption.³⁶¹ In the case of a foreign defendant, it is very likely that the presumption of reasonableness can be rebutted by the fact that he resides in a foreign country.³⁶² Thus, in this hypothetical, it is highly probable that the court would not assert personal jurisdiction. This decision may be effected if the plaintiff was trying to recover under the single publication rule for damage to his reputation from all the WWW page accesses in the United States, as well as other countries.³⁶³

356. See *supra* note 293 and accompanying text (discussing *World-Wide Volkswagen* and the effect of a unilateral activity).

357. See *supra* notes 291-94 and accompanying text (examining *World-Wide Volkswagen* as providing when there is purposeful direction, jurisdiction is proper in the states where injury results from the manufacturer's product).

358. See *supra* notes 298-99 (discussing *Asahi*, where although products were injected into the stream of commerce, the unreasonableness of forcing foreigners to defend themselves in a foreign forum outweighed this).

359. See *supra* notes 303-19 and accompanying text (analyzing the "effects" test).

360. See *supra* notes 315-17 and accompanying text (providing cases interpreting *Calder* as standing for this proposition); see also note 316 and accompanying text (setting forth cases where courts exercised jurisdiction although plaintiff did not reside there, based on the effects to plaintiff's reputation there).

361. See *supra* note 316.

362. See *supra* notes 298-302.

363. See *supra* note 151-54 (discussing *Keeton v. Hustler* and the Single Publication rule).

Additionally the other factors stated in *World-Wide* may affect the balance otherwise.³⁶⁴

V. CONCLUSION

It is not unrealistic that private individuals may find themselves liable and subject to the jurisdiction of a foreign country for their defamatory Internet communications.³⁶⁵ This is especially so in England where the libel laws favor the plaintiff,³⁶⁶ and in the United States if the forum state subscribes to the "effects" test³⁶⁷ or views Internet communications as purposeful injections into the stream of global communications.³⁶⁸ In determining how to apply current U.S. and English jurisdiction law to the Internet, recognition of the nature of the medium is crucial.

Application of a doctrine based on geographic territory concepts to a world without geographic parameters may prove unworkable.³⁶⁹ The Internet is growing into a predominant medium for global communication.³⁷⁰ It is unique and unlike any other media form.³⁷¹ Applying a doctrine developed without knowledge or understanding of this new and ever growing technology is problematic.³⁷² In the United States, it is contradictory to apply a doctrine whereby knowledge of a geographic postal address or area code can control the outcome of a suit, to communications purposefully directed to a world audience, yet utilizing computer addresses. In England, there exists the potential for serious consequences to the

364. See *supra* note 292 and accompanying text (discussing the *World-Wide Volkswagen* factors).

365. See *supra* Parts IV(A)(6), (B)(4)-(5) (setting forth applications of U.S. and English jurisdictional law to the Internet).

366. See *supra* note 58 and accompanying text (providing the presumptions existing in favor of a plaintiff bringing suit for libel in England).

367. See *supra* notes 308-18 and accompanying text (discussing *Calder* and various interpretations applied).

368. See *supra* notes 344-50 and accompanying text (comparing Internet communications to injecting goods into the stream of commerce).

369. See Colin Stretch, *Internet Technology and Personal Jurisdiction*, *supra* note 344 (recognizing that "territorial jurisdiction" may be irrelevant to a world not reliant on geographic borders); see also Susan Ross, *supra* note 341, at 12 (providing that the Internet knows no boundaries). Susan Ross is an attorney, engineer and founder of InterLegal Services, Inc. *Id.* See Guylyn R. Cummins, *Cyberspace Censorship Threatens Us All*, GRAY, CARY, WARE FREIDENRICH Q., Spring/Summer 1996, at 5 (discussing the context of free speech, the problem of applying an old doctrine to an uncomprehended 21st century technology).

370. See *ACLU v. Reno* (visited Sept. 29, 1996) <<http://lawlinks.com/flacom/recent/acireno.html>>, (commenting on the unanimous recognition by a three judge panel of a Federal District Court that the Internet communication, unlike the broadcast media, is two-way and global); *ACLU v. Reno*, 929 F.Supp 824, 883 (E.D. Pa. 1996) (referring to Internet as "never-ending worldwide communication").

371. *ACLU v. Reno*, 929 F.Supp. at 844 (recognizing the Internet as a unique form of global communication).

372. See also Cummins, *supra* note 369 at 5 (addressing the problem of applying old laws to a technology not understood by lawmakers).

English legal system as a result of Internet libel cases due to the ease of bringing libel suits in England.³⁷³

A. Proposals

1. New Laws

It is arguable that new laws are needed to adapt to this new medium of global communications technology. However, since the Internet knows no global boundaries, different regulations from various countries may only add to the confusion.³⁷⁴ Additionally, one should be wary of too much government intervention into the most free mode of mass communications yet.³⁷⁵ An unwanted consequence would be the stifling of the existing free exchange of ideas.³⁷⁶ Finally, the technical difficulty of government intervention with the Internet should be considered.³⁷⁷

2. Ignorance Is No Excuse

It is fair to say that those communicating via the Internet realize that they can communicate worldwide. Furthermore, Internet communicators using e-mail or participating in newsgroups know before they post their communication that it will be sent out worldwide.³⁷⁸ Armed with this knowledge, they should not be permitted to claim ignorance when their communication enters the global stream of communication. Rather, they should be held legally responsible for their actions. Perhaps the defamation laws of every country should appear on Internet users' screens when they log on. Then users cannot claim ignorance of the law regarding defamation worldwide.

373. See Martin Bright, *Caught in the Net*, THE GUARDIAN (Manchester), Apr. 25, 1996, at T10 (reporting the comments of London media lawyer, Nick Braithwaite). Braithwaite believes Internet libel cases could have considerable effect on the British court system since plaintiff's will choose countries, such as England, which have repressive libel laws. *Id.*

374. About half of all Internet communications come from outside the United States. *ACLU v. Reno*, 929 F.Supp. at 883.

375. See *id.* at *204 (recognizing that the Internet is the most "participatory form of mass speech yet developed" and that it "deserves the highest protection from governmental intrusion").

376. See generally *id.* (addressing the importance of free speech on the Internet).

377. See generally *id.* (discussing the technological nature of the Internet). It is technologically infeasible for Internet speakers to limit the geographic scope of their communications, as it is for government screening. *Id.* at 878. See *Why the Net Should Grow Up*, ECONOMIST, Oct. 19-25, 1995 at 17 (recognizing that policing the Internet is more difficult than television since the Internet transmits content worldwide).

378. See *supra* note 348 and accompanying text (discussing the knowledge Internet communicators possess regarding the worldwide distribution of their communications).

3. Contract

Contracts between users and Internet access providers could delegate responsibility for Internet defamations. These could be on a one time basis when the user signs up with the access provider, or in the form of an on-line contract every time a user logs on. This way, Internet users would be fully informed as to defamation law, where and when they can be subject to liability, and have the choice of taking the risk with their communications. Since the Internet is global, perhaps an international organization composed of Internet access providers could draft a uniform contract for all Internet users to sign, setting forth the law governing defamatory Internet communication and the manner and location in which disputes will be resolved.

4. Equal Access

With traditional forms of communications, such as broadcast and newspaper, the private individual did not have the opportunity to defend themselves to the public.³⁷⁹ With the Internet, however everyone has equal access to communicate with very little cost involved. Therefore, perhaps individuals should be left to defend themselves in the same way they were defamed, rather than using the judicial system.³⁸⁰ Furthermore, at least when dealing with private individuals, it seems that a law suit may not be worth the cost, since not all individuals have deep pockets.³⁸¹ The better remedy is for defamed to go on-line and fight back themselves. Alternatively, maybe a global Internet policy first giving the defamer the opportunity to cure the harm in the same manner he caused it, before jumping to the courts is an option.

Regardless of the solution, one thing is clear. Guidelines for operating on-line are necessary so individuals are aware of when and where they will be legally responsible for their actions. Internet communication is the most free form of mass communication yet. At the beginning of its popularity, flame wars, whereby users launched personal attacks at each other and all had equal access to defend themselves, were common.³⁸² Now that defamation lawsuits have entered the

379. See generally *ACLU v. Reno*, 929 F.Supp. at 877 (recognizing that the Internet presents identical low barriers to entry for all users and that the medium "creates a relative parity among speakers").

380. See Resnick, *supra* note 25 (providing the thoughts of Mr. Godwin of the Electronic Frontier Foundation). The better remedy for defamed persons is to get on-line and "correct the record." *Id.*

381. See *id.* (providing the thoughts of Mr. Godwin of the Electronic Frontier Foundation). Mr. Godwin states that although there is greater potential for libel suits from Internet communications, the number of suits actually filed will be limited since most defendants will be individuals, rather than publishers with deep pockets. *Id.*

382. See Brid, *supra* note 373 (noting that newsgroup participants, often involved in flame wars, must now be more careful in light of the recent Internet libel suits); see also Resnick, *supra* note 25 (recognizing that casual flame wars on the Internet provide more libel causes of action than other forms of media).

world of Internet communications, users will have to change the freedom with which they speak. Without clear guidelines, these users are left to communicate at their own risk.³⁸³

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383. *See id.* (providing the comments of Mr. Sanford, attorney for Meeks in the Internet libel suit of Suarez Corp. Industries v. Brock N. Meeks, 267513 (Ct. of Common Pleas, Cuyahoga Co.)). With the rise of libel suits from Internet communications, people will be more aware of the potential for legal liability and be more careful about what they write. *Id.*

384. B.A., Brandeis University, 1989; J.D., University of the Pacific, McGeorge School of Law, to be conferred, 1997. I would like to thank Alex Kaplinsky for his time and patience in teaching me about the Internet. I also wish to thank Stephanie Forbes, Tim Naprawa, and J. Clark Kelso for their help in completing this comment.